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Leasing Consumer Goods: The Spotlight Shifts to the Uniform Consumer Leases Act

RALPH J. ROHNER*

*"[A]n important challenge for consumer financial services law and lawyers in the twenty-first century is to rationalize that area of law by creating a clearer and more simple and uniform system of rules to govern everyday consumer financial transactions. In other words, to do for consumer financial services law what the Uniform Commercial Code (U.C.C.) did for commercial transactions. Last year [2001], the National Conference of Commissioners on Uniform State Laws (NCCUSL) took a step in that direction by promulgating the Uniform Consumer Leases Act (UCLA) for possible enactment by the states. That enactment would make the law in this area uniform on both the federal and state levels, and do much to smoothly coordinate the two."*¹

As a participant throughout the drafting process for the Uniform Consumer Leases Act ("U.C.L.A." or "the Act"),² I believe that the Act deserves serious consideration in the state legislatures to fill gaps in existing

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¹ Lynne B. Barr et al., *Introduction to the 2002 Annual Survey of Consumer Finance Services Law*, 57 BUS. LAW. 1157, 1157 (2002) (internal citations omitted).

² The Uniform Consumer Leases Act ("U.C.L.A.") and its Official Comments are published in UNIF. CONSUMER LEASES ACT, 7A U.L.A. 3 (2002). They are also available through the web site of the National Conference of Commissioners on Uniform State Laws, available at <http://www.nccusl.org> (last visited Nov. 9, 2002) (on file with Connecticut Law Review).

consumer protections for consumer lessees.³ The Act complements the Uniform Commercial Code ("U.C.C.") Article 2A (Leases), which creates a basic legal framework for all leases of goods, commercial and consumer alike, and the federal Consumer Leasing Act,⁴ which prescribes advertising and disclosure rules for consumer leases. The U.C.L.A. is also intended to reinforce, or be reinforced by, certain existing state laws, such as those prohibiting unfair or deceptive acts or practices ("U.D.A.P.") laws and "lemon laws," which provide remedies for defective goods. There are scattered existing state laws specifically dealing with consumer leases, some of which are limited to motor vehicle leases. These laws would, for the most part, be repealed if the U.C.L.A. is enacted. The U.C.L.A. can be compared generally to the various state "retail installment sales acts" applicable to credit sales of motor vehicles and other consumer goods. It provides for disclosure of lease terms, restricts (or in some cases requires) certain lease provisions and practices, regulates the process of terminating a consumer lease, and provides an enforcement structure that includes private and public remedies.

I. SETTING THE STAGE: LEASING VS. BUYING

A. *Emergence of Lease Products for Marketing Consumer Goods*

Sedans, coupes, SUVs, pick-up trucks, muscle cars—motor vehicles of every sort; computers, sofas, refrigerators, A/V entertainment systems, pianos, piccolos—even perhaps a tuba for an aspiring high school band member: These are typical of the "goods" American consumers crave to own and use. Consumer access to these and similar goods has been a benchmark of the quality of life in our times. Producers and distributors of these consumer goods compete vigorously in their marketing, seeking customers willing to pay cash or to finance the acquisition through a credit sale or purchase money loan.⁵ That marketing competition now includes

³ Connecticut is the first state to enact the U.C.L.A. Uniform Consumer Leases Act, 2002 Conn. Pub. Acts 02-81 (Reg. Sess.). References to the Connecticut U.C.L.A. hereinafter are to "CONN. U.C.L.A."

⁴ 15 U.S.C. §§ 1667-1667f (2000). The Act is implemented through the Federal Reserve Board's Regulation M, 12 C.F.R. § 213 (2002).

⁵ "Credit sale" generally refers to a transaction in which the *seller* extends credit by deferring payment of the purchase price over time. See Truth in Lending (Regulation Z), 12 C.F.R. § 226.2(a)(16). The Uniform Consumer Credit Code similarly defines "consumer credit sale," UNIF. CONSUMER CREDIT CODE (U.C.C.C.) § 1.301(12) (1974). The U.C.C.C. is published in 7 U.L.A. (2002). In addition, the Federal Trade Commission ("FTC") uses the comparable phrase "financed sale." FTC Trade Regulation Rule on Preservation of Consumers' Claims and Defenses, 16 C.F.R. § 433.1(e) (2002). A "purchase money loan" generally means a transaction in which a *lender* advances funds to a buyer to enable the buyer to purchase goods from a seller. See *id.* § 433.1(d). Both transaction forms—credit sale and purchase money loan—usually include a security interest covering "pur-

offering consumers the option to lease the item of choice on a relatively long-term basis,⁶ rather than buy it outright. Consumers shop with their feet, and with their hearts, and sometimes with their brains, and often find the lease option to be an attractive one.⁷

The great bulk of goods leased to consumers are motor vehicles. By the mid-1990s, more than one-third of all new cars delivered at retail were leased rather than sold.⁸ That proportion has flattened or even shrunk in recent years,⁹ but remains a significant portion of the new car market. Leases of other forms of goods tend to cluster in niche markets, such as furniture for transient consumers, computers and other electronics systems, and musical instruments for family or household use. In the auto markets, most dealers offer lease and sale options side by side, or car by car: The customer may select the vehicle first, and the financing method later. Furniture and musical instrument lessors tend to specialize in lease arrangements. Overall, a significant, but certainly not dominant, portion of the marketing of consumer goods is in lease format.

B. *Why Lease, Not Buy?*

What makes the lease option attractive? For the merchant dealer or leasing company, it is a financing alternative they can offer at attractive rates of return, to induce consumers to acquire goods they might not wish, or be able, to purchase for cash or finance on a conventional credit basis.

chase money collateral" and securing a "purchase money obligation" as those terms are used in the U.C.C. U.C.C. § 9-103(a) (2002).

⁶ Consumers may have short-term lease or rental options as well, such as for a vacation car rental or the weekend rental of garden tools, but these are not really options to purchasing those goods. "Rent-to-own" or "rental-purchase" transactions are something of a hybrid; they are typically written as short-term obligations (weekly or monthly), but are automatically renewable for an extended period, and the consumer becomes the owner on completion of payments over that span. Susan Lorde Martin & Nancy White Huckins, *Consumer Advocates vs. the Rent-To-Own Industry: Reaching a Reasonable Accommodation*, 34 AM. BUS. L.J. 385, 385-86 (1997) (discussing typical rent-to-own transactions); David L. Ramp, *Renting to Own in the United States*, 24 CLEARINGHOUSE REV. 797 (1990) (discussing rent-to-own contracts).

⁷ The following quote exemplifies the reasons why leasing is so popular with consumers:

It's easy to see why consumers find leasing so seductive. After all, with little or no money down and for a "low" monthly payment, you can drive an automobile you never imagined you could afford to own. . . . With a lease, the scent of fresh leather upholstery need never leave your nostrils.

It's the Lease You Can Do, CONSUMER REP., Jan. 2001, at 12.

⁸ See AFSA Spotlight on Financial Services, *Auto Leasing Slows*, at <http://www.spotlightonfinance.com/free/Stories/story9.htm> (last visited Nov. 4, 2002) (on file with the Connecticut Law Review).

⁹ A trade association Web page succinctly describes the shrinkage of market share:

Personal use leases accounted for 32.7 percent of new vehicle sales (autos and light trucks) in the first nine months of 1999, down from 34.2 percent in the same period a year earlier. . . . CNW Marketing/Research predicts that leasing will account for less than 30 percent of new vehicle sales in 2000, the lowest level since 1993.

Id.

So long as the rent charges imposed and the disposition value of the goods at the end of the lease term hold to the lessor's projections, the lease arrangement has profit opportunities (and risks) not unlike those in secured credit sales—including the right to repossess the goods on default.¹⁰ There may also be tax and accounting advantages for the lessor who leases rather than sells its inventory. From the consumer viewpoint, leasing goods over an agreed period of time typically requires less front-end cash (small or no down-payment), and generally smaller monthly payments for goods of comparable quality, than a credit purchase.¹¹ In the auto leasing context, why buy a Chevrolet when you can lease a Cadillac for the same cash flow?¹² Of course, the consumer's "risk" is that no ownership equity accrues during the lease term, and on the expiration of the lease the consumer surrenders the goods back to the lessor and looks for a new car.

C. *Contrasting Lease and Sale*

The essential legal components of a lease contract covered by the U.C.L.A. are explored more fully below. For the moment it is enough to contrast a lease to its marketplace alternative, a sale. On delivery of the goods to the buyer in a cash sale or an unsecured credit sale, the buyer acquires "title" to the property.¹³ That is, the buyer has the right to permanent possession and use of the property, and can keep, donate, or resell it at his discretion, enjoying both the benefits and the risks of long-term durability or depreciation of the property. Even when the buyer purchases on secured credit, the buyer becomes the owner and the creditor's rights in the property are limited to a security interest¹⁴ that is enforceable only on the

¹⁰ See U.C.C. § 2A-525 (right to repossession in a lease); *id.* § 9-609 (right to repossession in a secured credit transaction). One attraction of casting the transaction as a lease is to free the lessor from the strictures of U.C.C. Article 9 relating to foreclosure and disposition of collateral.

¹¹ In a purchase on credit, the buyer will pay the full value of the goods over the specified payment period, e.g., thirty-six months for an auto loan. The buyer will then own the vehicle outright, unencumbered by any continuing security interest, with (usually) a number of years of useful life or resale/trade-in value left in it. In a thirty-six-month lease, by contrast, the lessee's rent payments only need to cover *part* of the value of the goods—roughly the expected depreciation of the goods over the three-year lease period. The goods then revert to the lessor who can sell or re-lease the goods to recover their remaining value.

¹² One report noted the upscale effect of auto leasing: In 1999 "59.4 percent of Mercedes cars were leased v. 5.5 percent of Ford cars." AFSA Spotlight on Financial Services, *Auto Leasing Slows*, at <http://www.spotlightonfinance.com/free/Stories/story9.htm> (last visited Nov. 4, 2002) (on file with the Connecticut Law Review).

¹³ Section 2-106(1) of the U.C.C. states that "a 'sale' consists in the passing of title from the seller to the buyer for a price." U.C.C. § 2-106(1). Generally, "title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods." *Id.* § 2-401(2). The legal rights, obligations, and remedies of buyers and sellers generally operate "irrespective of title to the goods." *Id.* § 2-401.

¹⁴ *Id.* § 1-201(37) ("[T]he retention or reservation of title by a seller of goods . . . is limited in effect to a reservation of a security interest.").

debtor-buyer's default, subject to numerous protections for the buyer's equity.¹⁵ When the secured party in a consumer credit sale sells—"hypothecates"—its rights to a secondary financier, that assignee generally acquires only the limited rights of the assignor.¹⁶ Throughout, the buyer remains the title holder of the goods bought. The merchant's pricing of a credit sale requires only setting a cash price and then adding credit and related charges¹⁷ that will compensate for the time value of money and the risk of default during the payment period.

A lease, by contrast, is defined in the U.C.C. as "the right to possession and use of goods for a term in return for consideration."¹⁸ The consumer gets to keep and drive the leased car, but only for a specified period of time, in exchange for rent payments that are the consideration.¹⁹ The lessee acquires no semblance of title or ownership. Thus, on the basis of the lease alone, the lessor may repossess the goods—the lessor's property, after all—when the lessee does not pay or otherwise defaults, and the lessee must return the goods at the expiration of the lease (or may buy the goods at a "purchase option" price, if one is offered). As a general theory, unless the parties agree otherwise, the depreciation risk, and the risk of physical casualty to the goods, remain with the lessor.²⁰ If the lessor wants to assign its lease paper to secondary financiers, it may do so, but typically the lessor will assign not only the lessee's payment obligation, but also title to the

¹⁵ See *id.* §§ 9-611 to 9-614 (notification before disposition of collateral); *id.* § 9-616(b) (explanation of surplus or deficiency); *id.* § 9-620(e) (mandatory disposition of collateral); *id.* § 9-623 (right to redeem collateral). Other law may provide the buyer/debtor additional protections, such as a right to cure a default. See, e.g., U.C.C. § 5.109-.111 (2002).

¹⁶ U.C.C. § 9-404. The FTC Rule on Preservation of Consumers' Claims and Defenses eliminates "holder in due course" protections for assignees of most consumer credit sale or purchase money loan obligations. 16 C.F.R. § 433.2 (2002). The U.C.C. reinforces this in secured transactions by nullifying waiver of defense clauses in consumer contracts. U.C.C. § 9-403(d).

¹⁷ For disclosure purposes under the Truth in Lending Act, the basic cost of credit is the "Finance Charge," defined in great detail in Regulation Z. 12 C.F.R. § 226.4 (2002). However, that definition excludes from the Finance Charge numerous known or contingent charges that the borrower will or may pay, such as security interest filing fees, insurance premiums, late fees, delinquency and default charges, and certain mortgage settlement costs. See *id.*

¹⁸ U.C.C. § 2A-103(1)(j).

¹⁹ By long-standing convention in both real and personal property leasing, rent payments are considered earned and are usually payable at the *beginning* of each rental period. Thus in a contemporary auto lease, the customer typically pays the first month's rent at closing, i.e., before delivery of the car, and makes the final rent payment a month before the lease expires. By contrast, credit obligations are conventionally due at the *end* of each payment period. The automobile buyer usually makes her first payment a month after closing and delivery of the car, and the final payment at the end of the last month of the payment schedule.

²⁰ See U.C.C. § 2A-219. Under the U.C.C. the parties to a lease are free to allocate depreciation, casualty, and other leasehold risks by contract, and in fact it is mainstream practice to allocate some or all of those risks to the lessee. *Id.* §§ 1-102(3), 2A-102 & official cmt. This is true unless non-U.C.C. statutory law prohibits the risk allocation. See *id.* § 2A-104(1)(c). A lease under Article 2A is also subject to consumer protection statutes or court decisions in the state. *Id.*

goods themselves.²¹

Leases have become a common and accepted alternative means for consumers to acquire the use of goods they desire for transportation, household use, or other purposes. Leases are offered in the same general markets as cash and credit sales. Leases involve, by and large, the same consumers, the same merchants and financiers, and the same marketing ingenuity and dynamics that have prompted a half century of federal and state consumer protection laws for cash and credit customers.²² So what does a newly-arrived, twenty-first century, Uniform Consumer Leases Act bring to the consumer protection table? How does it relate to, and fit into, the existing legal environment for consumer transactions? Before dissecting the U.C.L.A. itself, it is necessary to appreciate the legal environment for consumer leases *before* the U.C.L.A.'s arrival. Some, but not all, of existing law affecting leases of goods will continue to apply even after the U.C.L.A. is enacted.

II. THE EXISTING LEGAL ENVIRONMENT FOR CONSUMER LEASES

The law of leasing has developed through a predictable path, from common law roots to an array of federal and state statutory enactments. While some of this existing law may be displaced by the U.C.L.A., much of it will continue in place.

A. *Pre-Statutory Rules*

The acquisition of capital assets (in our case, consumer goods) through leases is hardly brand new.²³ The contemporary short-term rent-a-car industry has been around for decades, as have short-term rentals of lawn tools, furniture, party equipment, and the like.²⁴ Even earlier, leases of personal property were long recognized as distinctive, legitimate market

²¹ In a typical motor vehicle lease, the original "lessor" is the retail car dealer, who has pre-arranged to assign the customer contract to a financial institution or finance company. The registration and certificate of title for the car will usually be in the name of that assignee. But if the assignee further transfers its leases, such as for securitization, title to the goods may be left with the first assignee who will continue to handle collections and other servicing of those transactions.

²² See generally DEE PRIDGEN, *CONSUMER CREDIT AND THE LAW* (West 2000) (tracking consumer credit protection laws); DEE PRIDGEN, *CONSUMER PROTECTION AND THE LAW* (West 2002) (charting modern consumer protection laws).

²³ Transactions equivalent to leases "have roots that date back thousands of years." Edwin E. Huddleson, III, *Old Wine in New Bottles: U.C.C. Article 2A—Leases*, 39 ALA. L. REV. 615, 616 n.1 (1988) (citation omitted). Justice Story, in the middle of the nineteenth century, wrote of the law of "bailments for hire." JOSEPH STORY, *COMMENTARIES ON THE LAW OF BAILMENTS* § 368 (Fred B. Rothman & Co., 8th ed. 1986) (1870).

²⁴ See generally RAY ANDREWS BROWN, *A TREATISE ON THE LAW OF PERSONAL PROPERTY* ch. X (Calloghan & Co. 1936) (providing an early twentieth century perspective on "bailments" of goods).

transactions.²⁵ Long-term motor vehicle leases at the retail level trace perhaps to Henry Ford. Variants such as hire-purchase contracts in Great Britain,²⁶ and rent-to-own contracts in the United States²⁷ also have long and distinctive roots. The law originally governing all of these arrangements was the common law of property and contracts, until such time as state legislation began to address consumer leases specifically.²⁸ The courts fashioned a not very uniform body of case law guidance, borrowing from real property law, common law, or statutory law dealing with sales of goods.²⁹ This common law of leases continued to be the dominant source of substantive lease-law authority, especially in the burgeoning field of commercial equipment leasing, until the promulgation of U.C.C. Article 2A in 1988.³⁰

In light of other federal and state statutory developments, discussed below³¹ and now including the U.C.L.A., common law lease precedents probably have little role in the matrix of statutory consumer protection rules for leases. Occasionally, these common law precedents will serve as "supplementary general principles of law"³² when not displaced by U.C.C. Article 2A or other statutory directives.

B. *The Federal Consumer Leasing Act*

Although the U.C.C.C., first promulgated in 1968 and revised in 1974, dealt with some aspects of consumer leases, that act was not widely enacted.³³ The first nationwide legislation dealing with consumer leases of personal property came from Congress. It was the federal Consumer Leas-

²⁵ *Id.*

²⁶ See A. D. Hughes, *Hire-Purchase in Modern Britain*, J. BUS. L. 307 (1967); R. G. Lawson, *The Future of the Hire-Purchase Contract*, 126 NEW L.J. 1060 (1976).

²⁷ See sources cited *supra* note 6. In 2002, the U.S. House of Representatives passed a bill that would add the "Rent-To-Own Protection Act" as a new Title X to the Consumer Credit Protection Act, establishing federal disclosure rules for rent-to-own transactions. H.R. 2498, 107th Cong. (1st Sess. 2001). There was no action by the U.S. Senate. This industry-supported bill is a response to aggressive legislation and litigation in some states to treat rent-to-own transactions more like credit sales. If enacted by Congress, this bill would reinforce the distinctiveness of rent-to-own transactions, compared to credit sales (with disclosures under the Truth in Lending Act) and longer-term leases (with disclosure under the federal Consumer Leasing Act). Section 1011 of the proposed act specifies that the federal Consumer Leasing Act does not apply to a rent-to-own transaction. See *id.*

²⁸ See *infra* note 112.

²⁹ It was tempting, probably irresistible, for courts facing lease issues to look to U.C.C. Article 2 for guidance, since that Article states its own scope as "transactions in goods," not literally limited to sales. An early leading case is *Cintrone v. Hertz Truck Leasing & Rental Service*, 212 A.2d 769, 775-76 (N.J. 1965) (adopting U.C.C. Article 2 warranty rules for a lease transaction).

³⁰ U.C.C. art. 2A (2002).

³¹ See *infra* Part II.B-D.

³² U.C.C. § 1-103; see also U.C.L.A. § 106 (2002).

³³ William J. Woodward, *Private Legislation in the United States—How the Uniform Commercial Code Becomes Law*, 72 TEMP. L. REV. 451, 466 (1999).

ing Act of 1976³⁴ ("C.L.A."), enacted in the heyday of federal intervention in the consumer financial services markets.³⁵ The C.L.A. was formally proposed and initially drafted by the Federal Reserve Board³⁶ as part of its monitoring function under the Consumer Credit Protection Act of 1968 ("C.C.P.A."),³⁷ and was a natural extension of the transactional disclosure philosophy embodied in the Truth in Lending Act a few years earlier.

The C.L.A. was not considered radical at the time.³⁸ The act was signed into law in 1976, as Chapter 5 of the Truth in Lending Act ("T.I.L.A.") (and by virtue of that location it shares the T.I.L.A. enforcement structure).³⁹ The C.L.A. laid out a disclosure framework for consumer leases, including lease advertising and transactional disclosures, with the details to be refined in regulations of the Federal Reserve Board. These regulations, known as Regulation M,⁴⁰ remained virtually untouched

³⁴ 15 U.S.C. §§ 1667-1667f (2000).

³⁵ In the decade beginning in 1968 Congress enacted:

- The Consumer Credit Protection Act of 1968 (codified at 15 U.S.C. § 1692), containing the Truth in Lending Act and restrictions on wage garnishments and "extortionate" credit, and creating the National Commission on Consumer Finance;

- The Unsolicited Credit Card and Truth in Lending Amendments of 1970 (codified at 15 U.S.C. § 1601);

- The Fair Credit Reporting Act (1970) (codified at 15 U.S.C. § 1681);

- The Fair Credit Billing Act (1974) (codified at 15 U.S.C. § 1601);

- The Equal Credit Opportunity Act (1974) (codified at 15 U.S.C. § 1691);

- The Consumer Leasing Act (1976) (codified at 15 U.S.C. § 1667);

- Equal Credit Opportunity Act Amendments (1976) (codified at 15 U.S.C. § 1691);

- Magnuson-Moss Warranty & Federal Trade Commission Improvement Act (1974) (codified at 15 U.S.C. § 2301);

- The Real Estate Settlement Procedures Act (1974), and Real Estate Settlement Procedures Act Amendments (1975) (codified at 12 U.S.C. § 2607 (2000));

- The Fair Debt Collection Practices Act (1977) (codified at 15 U.S.C. § 1692); and

- The Electronic Fund Transfer Act (1978) (codified at 15 U.S.C. § 1693).

³⁶ BD. OF GOVERNORS OF THE FED. RES. SYS., 61st ANNUAL REPORT 268 (1974).

³⁷ Pub. L. No. 90-321, 82 Stat. 146 (1968). This was the umbrella legislation that included the Truth in Lending Act as Title I. Over the years the C.C.P.A. has become the host for a number of additional titles including the Credit Repair Organizations Act (Title IV), the Fair Credit Reporting Act (Title VI), the Equal Credit Opportunity Act (Title VII), the Fair Debt Collection Practices Act (Title VIII), the Electronic Fund Transfer Act (Title IX), and others.

³⁸ This author was staff counsel to the Senate Banking Committee at the time, and participated extensively in the legislative processing of the C.L.A. "[T]he consumer leasing bills in both houses of Congress were almost completely noncontroversial." Ralph J. Rohner, *Consumer Credit Legislation in the Ninety-Fourth Congress—and a Look Ahead*, 9 U.C.C. L.J. 307, 330 (1977). The major consumer finance bill in that congressional session was the Equal Credit Opportunity Act Amendments, Pub. L. No. 94-329, 90 Stat. 251 (codified at 15 U.S.C. §§ 1691-1691f).

³⁹ 15 U.S.C. § 1667d; 15 U.S.C. §§ 1607, 1640. T.I.L.A., and thus the C.L.A., authorize enforcement by federal agencies and through private civil actions for actual and statutory damages (plus costs and attorney's fees).

⁴⁰ 12 C.F.R. § 213 (2002). The Federal Reserve Board staff has also issued an extensive Commentary on Regulation M. *Id.*

for almost twenty years, but by the early 1990s it was apparent that Regulation M needed an overhaul to reflect contemporary leasing practices. After an extended drafting and consultation period, and with a push from Congress,⁴¹ the Federal Reserve issued a new version of Regulation M in 1996,⁴² with an effective date of January 1, 1998. The revised Regulation M has been generally well-received.⁴³

The federal C.L.A. is not of universal application to all leases to consumers. The lease must involve an individual (a "natural person") leasing personal property⁴⁴ for personal, family or household purposes.⁴⁵ The lease obligation must extend beyond four months,⁴⁶ which excludes short-term rentals and most rent-to-own leases,⁴⁷ and the contract obligation must be \$25,000 or less.⁴⁸ The C.L.A. also does not apply to a "dirty lease," i.e., a transaction that is in fact a credit sale with a security interest.⁴⁹ Such a transaction is treated as a credit transaction subject to T.I.L.A. and Regulation Z.⁵⁰

⁴¹ In an otherwise unrelated law, the Economic Growth and Regulatory Paperwork Reduction Act of 1996, Congress amended the C.L.A. somewhat to expand and focus the Federal Reserve Board's regulatory responsibilities under that act. 15 U.S.C. § 1667f.

⁴² Regulation M, 61 Fed. Reg. 52,246 (Oct. 7, 1996) (codified at 12 C.F.R. § 213).

⁴³ See Jacqueline S. Akins, *Regulation M—"New and Improved,"* 52 CONSUMER FIN. L.Q. REP. 413, 423 (1998); Elizabeth A. Huber & Thomas B. Hudson, *Road Testing the New Regulation M*, 53 BUS. LAW. 1011 (1998).

⁴⁴ Both the C.L.A. and Regulation M state coverage in terms of leases of "personal property," rather than "goods" as in U.C.C. Article 2A and in the U.C.L.A. See U.C.C. § 2A-103(h) (2002). There is a potential divergence of coverage here. The C.L.A. defines "personal property" as "any property that is not real property." 12 C.F.R. § 213.2(l). "Goods," in the uniform state acts, are said to mean "all things that are movable . . . but the term does not include money, documents, instruments, accounts, chattel paper, general intangibles, or minerals or the like . . ." U.C.C. § 2A-103(1)(h). Section 102(a)(5) of the U.C.L.A. is virtually identical. Thus, the federal C.L.A. would literally apply to a lease of intangibles or choses in action that are excluded from U.C.C. Article 2A and the U.C.L.A. While consumers do not often rent intangible personal property, C.L.A. coverage could extend to a "lease" of computer software, a "general intangible" in U.C.C. terms. See U.C.C. § 9-102(a)(44) & cmt. 4.a (stating that "'goods' and 'software' . . . are mutually exclusive").

⁴⁵ 15 U.S.C. § 1667(1); 12 C.F.R. § 213.2(e).

⁴⁶ 15 U.S.C. § 1667(1).

⁴⁷ Rent-to-own contracts typically obligate the lessee only one rental period (a week or a month) at a time. The lessee can terminate the arrangement at the end of any period by returning the goods to the lessor.

⁴⁸ This means the total the consumer lessee will pay in front-end charges and monthly rent, but not including the residual value of the goods. 12 C.F.R. § 213 cmt. 2(e)-3. This \$25,000 figure has not been changed since 1976, and obviously an upscale auto lease could easily fall outside of coverage. For example, a thirty-six month lease with payments of \$800 per month would equal \$28,800.

⁴⁹ *Id.* § 213(e)(2). This is essentially the same issue that recurs under U.C.C. section 1-201(37): Whether the nominal "lease" transaction is really one in which the "lessee" will likely acquire the whole useful life of the goods, as where the lessee may become the owner of the goods at the end of the lease for no or nominal additional consideration. U.C.C. § 1-201(37).

⁵⁰ 12 C.F.R. § 226.2(a)(16).

Most of the 1996 revisions of the Regulation M disclosure rules were common-sensical, to correct ambiguities and to reflect lease costs more intelligibly,⁵¹ but several items were problematic and divisive. One such item related to the disclosure of early termination charges—usually a quite intricate formula for determining the lessee's pay-off responsibilities if the lease is terminated ahead of schedule.⁵² Consumerists argued that lessors should be required to disclose at the outset of the lease specific dollar pay-off figures, at the very least an example of the early termination charge at some point during the lease term.⁵³ The industry contended that any such

⁵¹ Paraphrased for brevity, the current Regulation M requires these disclosures to be made, "as applicable," before consummation of a consumer lease:

- a. A description of the leased property;
- b. Amount due at lease signing, itemized by type and amount;
- c. Payment schedule and total amount of periodic payments;
- d. Other charges, itemized by type and amount;
- e. Total of payments;
- f. In a vehicle lease, the payment calculation, including:
 - Gross capitalized cost;
 - Capitalized cost reduction;
 - Adjusted capitalized cost;
 - Residual value;
 - Depreciation and any amortized amounts;
 - Rent charge;
 - Total of base periodic payments;
 - The lease term;
 - Amount of each base periodic payment;
 - Itemization of other charges;
 - Total periodic payment.
- g. Early termination: conditions, charges, & notice;
- h. Maintenance responsibilities;
- i. Purchase option and price;
- j. Statement referencing other information in the lease;
- k. Liability for difference between residual and realized value;
- l. Right of appraisal;
- m. End-of-term liability (open-end leases);
- n. Fees and taxes;
- o. Insurance: coverage and cost;
- p. Warranties or guarantees;
- q. Penalties and delinquency charges;
- r. Security interest;
- s. Limitations on rate information.

12 C.F.R. § 213.4.

⁵² *Id.* § 213.4(g). This is roughly comparable to determining the unpaid principal balance when a credit obligation is prepaid, except that the terminology here is the "unamortized adjusted capitalized cost," or in the vernacular the "adjusted lease balance." It is complicated further by the fact that the goods are being returned to the lessor and their realized value must usually be factored into the calculation.

⁵³ Federal Reserve Board, Regulation M, Supplementary Information, 61 Fed. Reg. 52,246, 52,252-53 (Oct. 7 1996) (stating "other commenters [on the proposed revision of Regulation M] including some lessors and many consumer representatives, favored a full description of all aspects of a lessor's early termination method, along with an example of how that method would work").

figures would be inherently misleading because lessors could not, at lease signing, project the actual resale value of the car months or years in the future. Case law had clouded the picture further by suggesting that complex mathematical formulas were not "clear and conspicuous" as required by law, when a typical consumer would not likely understand them.⁵⁴ The regulatory result was to prescribe a disclosure of "the conditions" for early termination "and the amount *or a description of the method for determining the amount* of any penalty or other charge for early termination."⁵⁵ By Commentary authorization, a lessor can satisfy this requirement by a shorthand identification of the method—for example "the constant yield method"⁵⁶—but must furnish the lessee a more detailed explanation on request. In addition, in vehicle leases, there must be a warning as follows:

Early Termination. You may have to pay a substantial charge if you end this lease early. The charge may be up to several thousand dollars. The actual charge will depend on when the lease is terminated. The earlier you end the lease, the greater this charge is likely to be.⁵⁷

A solomonic solution, perhaps. We can not explain the early-termination formula to you, but you should know that it will cost you big bucks! While this compromise may resolve the disclosure aspects of early termination charges for the time being, the amounts of those charges are still open for debate.⁵⁸

The other disclosure issue addressed by the Federal Reserve Board in 1996 was whether to require or permit disclosure of a "lease rate." As a frame of reference, the linchpin disclosure for *credit* transactions under T.I.L.A. is the Annual Percentage Rate ("APR")—a defined, standardized

⁵⁴ In the watershed case of *Lundquist v. Security Pacific Auto Financial Services Corp.*, 993 F.2d 11 (2d Cir. 1993), *cert. denied*, 510 U.S. 959 (1993), the court found that the early-termination provision in the lease was "not reasonably understandable," because it contained a "byzantine formula, beyond the understanding of the average consumer." *Lundquist*, 993 F.2d at 15. This set off a round of not-quite reconcilable holdings in other federal circuits, several taking a more tolerant view of the early termination formula disclosure. See, e.g., *Applebaum v. Nissan Motor Acceptance Corp.*, 226 F.3d 214, 221-23 (3d Cir. 2000); *Channell v. Citicorp Nat'l Servs., Inc.*, 89 F.3d 379, 382-83 (7th Cir. 1996); *Highsmith v. Chrysler Credit Corp.*, 18 F.3d 434, 438-39 (7th Cir. 1994). The issue continues to be litigated (under the old Regulation M). *Clement v. Am. Honda Fin. Corp.*, 145 F. Supp. 2d 206, 211-15 (D. Conn. 2001).

⁵⁵ 12 C.F.R. § 213.4(g)(1) (emphasis added).

⁵⁶ *Id.* § 213.4(g)(2) & cmt. 4.

⁵⁷ *Id.* at § 213.4(g)(2) (emphasis omitted).

⁵⁸ There has been a smattering of litigation on what is a "reasonable" formula or amount for early termination charges. See, e.g., *Miller v. Nissan Motor Acceptance Corp.*, No. CIV.A.99-4953, 2000 WL 1599244, at *31-*32 (E.D. Pa. Oct. 27, 2000).

measure of the unit cost of credit stated as an annualized rate.⁵⁹ Most consumers are familiar with advertised or quoted APRs, and may even have shopped for credit on that basis. Theoretically it should be possible to calculate a comparable rate in a lease setting; indeed lessors know to the penny what their expected rate of return will be. A "lease rate" disclosure, then, would permit consumers to compare the relative costliness of one lease to another, and even to compare lease costs to credit costs. Congress considered but declined to include a "lease rate" disclosure in the original C.L.A. in 1976, feeling it was premature, or inappropriate, to impose that disclosure (and computational) regimen on leases.⁶⁰ In the 1996 revision of Regulation M, however, the issue surfaced again.⁶¹ But the Board declined to impose a lease rate disclosure,⁶² persuaded by commenters and its own in-house economic analysis⁶³ that it was impossible to prescribe a "rate" computation formula that could not be manipulated, or that would not be subject to widely divergent rate numbers for what were otherwise almost identical transactions.⁶⁴ Instead, the revised Regulation M nominally permits a lessor to advertise or provide a "rate" figure, but it must be accompanied by a notice stating that "this percentage may not measure the overall cost of financing this lease," and the lessor cannot use "annual percentage rate," "annual lease rate," or any equivalent terms.⁶⁵ The issue of a "lease rate" disclosure continued into the U.C.L.A. drafting process.⁶⁶

⁵⁹ 15 U.S.C. § 1606 (2000); Regulation Z, 12 C.F.R. §§ 226.14, 226.22; see also RALPH J. ROHNER & FRED H. MILLER, TRUTH IN LENDING 179 (Am. Bar Ass'n 2000) (explaining the significance of APRs in truth in lending).

⁶⁰ S. REP. NO. 94-590, at 5 (1976).

⁶¹ The Board requested comment on possible disclosure of a lease rate, both in its original Notice of Proposed Rulemaking for Regulation M and in its Proposed Rule revising Regulation M. 60 Fed. Reg. 48,757-58 (Sept. 20, 1995) (revision); 58 Fed. Reg. 61,035 (Nov. 19, 1993) (original).

⁶² Federal Reserve Board, Final Rule, 61 Fed. Reg. 52,246, 52,254-55 (Oct. 7, 1996).

⁶³ Appendix I to the Preamble—Regulatory Flexibility Analysis, 61 Fed. Reg. 52,269-81 (Oct. 7, 1996) (outlining difficulties of lease rate disclosure).

⁶⁴ Without getting too technical, the core problem is this: In a credit transaction, when the stream of payments is completed, the "ending balance" [or the future value ["FV"] function on your calculator] is virtually always \$0—the loan will be paid off—and one can confidently calculate the APR that will reflect the reduction of the original balance according to the schedule of payments. In a lease, however, the ending balance is the projected value of the goods at the end of the lease term (technically, the "residual value"): A figure that, at the time it is set and disclosed at lease signing, is an estimate. One lessor's estimate of residual value may differ dramatically from another lessor's for the identical automobile, for a variety of reasons: Regional differences in expected wear and tear, use of a different "guide book" on auto values, whether it is late or early in the model year, strategic marketing considerations, factory subvention of prices, etc. The Federal Reserve staff study provides examples of economically indistinguishable leases with different variables that would produce a range of supposed "lease rates." *Id.* at 52,270.

⁶⁵ 12 C.F.R. § 213.4(s) (2002).

⁶⁶ See *infra* Part V.D for a discussion of lease rates.

Hardly any reported litigation has yet emerged under the revised Regulation M. Case law under the older version of the regulation never approached the volume or intensity of litigation under Regulation Z,⁶⁷ the companion Federal Reserve Board regulation for credit transactions. The major issue in the cases was the proper disclosure of early termination charges, referred to above.⁶⁸

The original C.L.A. includes two substantive provisions, beyond the pure disclosures just discussed. One addressed a then-hot button issue that has faded in significance. The other remains a latent battleground for disputes under the U.C.L.A. as well as under the C.L.A. Both involve limitations on the lessee's liability at lease end.

The first is the matter of open-end leases.⁶⁹ In the commercial context, these are often referred to as "terminal rental adjustment clause" ("TRAC") leases.⁷⁰ These are leases in which the lessee bears the ultimate depreciation risk; i.e., at the end of the lease the goods are sold and the lessee is responsible for any shortfall below the projected residual value of the goods.⁷¹ In a simple example, if the lease projected that after thirty-six months the leased car would be worth \$15,000, and in fact it sells for only \$10,000, the lessee would be contractually obligated to pay the lessor the \$5,000 difference. This structure set off alarms for Congress, which perceived that lessors might set artificially high residual values (with resulting lower monthly payments), only to have the lessee confront a substantial balloon obligation at lease end.⁷² The upshot is a provision in the C.L.A. that effectively limits a lessee's liability in an open-end lease to three monthly payments.⁷³ The hot-button issue lurking in the background of

⁶⁷ 12 C.F.R. § 226.4.

⁶⁸ See cases cited *supra* note 54.

⁶⁹ Regulation M defines an "open-end lease" as a consumer lease in which the lessee's liability at the end of the lease term is based on the difference between the residual value of the leased property and its realized value. 12 C.F.R. § 213.2(i).

⁷⁰ Huddleson, *supra* note 23, at 638-42. The hallmark of a closed-end lease, by contrast, is that at lease end the lessee may return the goods (intact and with no more than normal wear and tear) and walk away without further liability. 12 C.F.R. § 213.

⁷¹ 12 C.F.R. § 714.2(d).

⁷² Some states had dealt with this problem by imposing statutory caps on the lessee's end-of-term liability. See, e.g., U.C.C.C. § 3.401 (2002) ("The obligation of a lessee upon expiration of a consumer lease... may not exceed twice the average payment allocable to a monthly period under the lease.").

⁷³ Congress might have written a simple provision that put a precise limit on open-end lease liability, like the U.C.C.C. provision in the preceding footnote. Instead, it wrote one of the most convoluted paragraphs imaginable. Section 183 unfolds as follows:

- Estimates of residual value in open-end leases must be reasonable and in good faith;
- There is a rebuttable presumption that the estimated residual value is not reasonable or in good faith if it exceeds the *actual* residual value by more than three monthly payments;
- The lessor may not collect the excess amount unless it successfully sues the lessee (by rebutting the presumption) and pays the lessee's attorney's fees;

Section 183 had nothing to do with consumer protection, but rather with the authority of national banks to engage in open-end leasing. Case law had suggested that it was impermissible for a national bank to assume the depreciation risk on property it financed.⁷⁴ The "presumption" approach was thought to solve this problem by leaving intact (ostensibly) the lessee's obligation to pay the full depreciated value of the goods.⁷⁵ The U.C.L.A. essentially replicates that provision.⁷⁶ Open-end consumer leases are rare these days, and there is not a single reported court decision applying the open-end limitation in C.L.A. § 183(a).

The other substantive piece of the federal C.L.A. is its "reasonableness" restraint on default and early termination charges in consumer leases—a standard that also carries over into the U.C.L.A.⁷⁷ Most lease contracts specify the amounts, or formulas for fixing the amounts, of various charges that may be imposed on the lessee for delinquency, default, or early termination. These are in the nature of liquidated damages provisions, traditionally tested by whether they provide a reasonable contract remedy in lieu of calculating actual damages on a case by case basis. The C.L.A. borrowed language from the liquidated damages provision in U.C.C. Article 2,⁷⁸ permitting such lease provisions, "but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the delinquency, default, or early termination, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy."⁷⁹

Litigation testing what is a "reasonable" early-termination liability formula under this federal-law provision has not yet gotten to the appellate courts.⁸⁰ The U.C.L.A. attempts to refine the test somewhat, but the issue remains an open one as discussed in more detail (in connection with section 405 of the U.C.L.A.) in Part VII.D.

- The presumption of unreasonableness and bad faith does not apply to excess wear and tear; and
- The parties may agree, post-termination, on the amount of any excess residual liability.

15 U.S.C. § 1667b(a) (2000).

⁷⁴ Rohner, *supra* note 38, at 334.

⁷⁵ *Id.*

⁷⁶ U.C.L.A. § 307 (2002).

⁷⁷ *Id.* § 106 official cmt.

⁷⁸ U.C.C. § 2-718(1) (2002). Because, at the time, there was no Article 2A to state a liquidated damages standard for leases, looking to Article 2 made sense.

⁷⁹ 15 U.S.C. § 1667c. Comparable language appears in both the U.C.C. and the U.C.L.A. See U.C.C. § 2A-504; U.C.L.A. §§ 304, 405; see also discussion *infra* Parts VIII.A.2, VIII.D.

⁸⁰ The leading, or at least lengthiest, trial court decision to date is *Miller v. Nissan Motor Acceptance Corp.*, No. CIV.A.99-4953, 2000 WL 1599244 (E.D. Pa. Oct. 27, 2000). See NAT'L CONSUMER L. CTR., TRUTH IN LENDING § 9.5 (4th ed. 1999 & Supp. 2001) (outlining regulation of early termination charges and relevant case law).

Thus federal law has for a quarter century specified the content and format of transactional disclosures and advertising for most consumer leases. It also sets baseline limitations on default and early termination charges. This federal law preempts any state disclosure rules that are "inconsistent,"⁸¹ but does not preclude additional state law disclosures or other provisions that give "greater protection and benefit to the consumer."⁸² Of necessity, then, the state-law U.C.L.A. must co-exist with the federal C.L.A.

C. *Uniform Commercial Code Article 2A*

By the 1980s leasing of goods for commercial and consumer purposes had grown to the point that the sponsors of the Uniform Commercial Code determined the need for a statutory framework for lease transactions. Instead of the parties, and courts, having to rely on elusive common law precedents, or adapting rules from U.C.C. Article 2 (Sales) by analogy, a codification of the law pertaining to the leasing of goods would provide rules that were responsive to contemporary practices while preserving freedom of contract for the parties. The result was the promulgation in 1988 of U.C.C. Article 2A (Leases),⁸³ which by 2002 had been adopted in forty-nine states and the District of Columbia.⁸⁴

Article 2A consciously tracks Article 2 in many respects, while also acknowledging that U.C.C. Article 9 controls "lease" transactions that, in economic fact, are security interests, not true leases.⁸⁵ Article 2A provides rules for contract formation, delivery and performance obligations (including warranties), repudiation and excuse, priority relationships with third parties, and remedies on default by the lessor or lessee. It provides a statutory backbone for the core contractual relationships in leases. But, like the rest of the U.C.C., the primary subject matter for Article 2A is commercial transactions, not consumer ones. While U.C.C. Article 2A provides useful generic rules for leases of goods, it is not a consumer protection statute. In fact, Article 2A expressly provides that a lease, though subject to Article 2A, is also subject to any applicable "consumer protection statute of this State, or final consumer protection decision of a court of this State"⁸⁶

⁸¹ 15 U.S.C. § 1667e(a); Regulation M, 12 C.F.R. § 213.9 (2002).

⁸² 15 U.S.C. § 1667e(a); Regulation M, 12 C.F.R. § 213.9.

⁸³ The best general background on Article 2A is in Symposium, *Article 2A of the Uniform Commercial Code*, 39 ALA. L. REV. 558 (1988).

⁸⁴ The hold-out jurisdictions are Louisiana and Puerto Rico. *Uniform State Laws Scorecard*, COM. L. NEWSL., July 2002, at 12-13 (ABA Sec. Bus. L.). Connecticut enacted U.C.C. Article 2A in 2002. 2002 Conn. Pub. Acts 02-131.

⁸⁵ The definition of "lease" in section § 2A-103(1)(j) of the U.C.C. excludes "retention or creation of a security interest," which must be assessed under the U.C.C. definition of security interest. See U.C.C. § 1-201(37).

⁸⁶ *Id.* § 2A-104(c).

Article 2A is therefore foundational for consumer leases; it validates the lease contract and provides default rules on performance responsibilities and remedies. To the extent lessees in general benefit from the default rules in Article 2A, consumer lessees benefit. And to the extent Article 2A hedges the parties' freedom of contract with universal boundaries of unconscionability⁸⁷ and good faith,⁸⁸ it discourages the worst kind of consumer oppression. It does not purport to be comprehensive with respect to consumer leases. According to the drafters: "Consumer protection in lease transactions is primarily left to other law."⁸⁹

This is not to say there is nothing in Article 2A that recognizes special concerns in consumer leases. In a statute like Article 2A that sanctifies freedom of contract, there inevitably must be some constraints on that principle, and the most likely context is leases involving consumers. One subtle aspect of this involves the "merchant" rules that impose additional expectations on lessors that are leasing professionals (as opposed to amateur consumers)—a heightened standard of good faith,⁹⁰ and the warranty of merchantability.⁹¹ Another aspect is the extended protection for "natural persons" as third-party beneficiaries of warranties.⁹²

There are a number of places where Article 2A provides explicit special rules or limitations for consumer leases.⁹³

1. *Definition of "Finance Lease"*

Section 2A-103(1)(g)(iii)(D) of the U.C.C. generally permits a lease to qualify as a "finance lease" if the lessor tells the lessee to communicate with the supplier to learn of the lessee's warranty rights; but this method of creating a finance lease does not apply to a consumer lease.⁹⁴

Formal recognition of "finance leases" is a centerpiece of Article 2A.

⁸⁷ *Id.* § 2A-108.

⁸⁸ *Id.* § 1-203.

⁸⁹ *Id.* § 2A-104 cmt. 4.

⁹⁰ See *id.* § 2A-103(3) (adopts the Article 2 definition of "good faith," which appears in U.C.C. section 2-103(1)(b): "'Good faith' in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade"). Note that Revised Article 1 now defines "good faith" to include the "fair dealing" component for all parties, not just merchants. *Id.* § 1-201(a)(20). Section 2A-103(3) also borrows the Article 2 definition of "merchant" from section 2-104(1).

⁹¹ See *id.* § 2A-212 (explaining the implied warranty that exists with regard to goods leased by a merchant).

⁹² See *id.* § 2A-216 (describing in Alternatives A and B that warranties extend to any natural person).

⁹³ See Fred H. Miller, *Consumer Leases Under Uniform Commercial Code Article 2A*, 39 ALA. L. REV. 957, 959-60 (1988) (explaining the relationship between Articles 2 and 2A and consumer law). Several of the items discussed in the text were added to Article 2A in 1990, after Prof. Miller's article was published.

⁹⁴ See U.C.C. § 2A-103 (1995), reprinted in 1998 SELECTED COMMERCIAL STATUTES 855 (adding this provision in the 1990 amendments to Article 2A).

This refers to a lease in which the nominal lessor is merely the financier of a transaction, and is therefore not responsible for warranties or other assurances on the goods.⁹⁵ Instead, in a finance lease the warranties of the supplier flow through to the finance lessee,⁹⁶ and the "finance lease" definition therefore provides several optional ways to assure that the lessee has access to warranty information from the supplier. It would be burdensome for consumers to have to pursue that information independently; thus section 2A-103(1)(g)(iii)(D) of the U.C.C. removes that option for a consumer finance lease. Moreover, while a consumer lease may qualify as a finance lease if the lessor gives the consumer lessee the relevant supplier's warranty information,⁹⁷ the Regulation M summary disclosure of warranties will not suffice for this purpose.⁹⁸

2. *Choice of Law and Forum*

Section 2A-106 limits choice of law to a jurisdiction where the consumer resides (or will reside within thirty days) or where the goods will be used. It also proscribes a choice of forum clause unless the chosen forum would otherwise have jurisdiction over the consumer lessee.⁹⁹

3. *Unconscionability*

Section 2A-108(2) and (4) expand the basic unconscionability limitation to include not just contract terms, but also contract *inducement* or *collection* with respect to consumer leases.¹⁰⁰ A consumer lessee who successfully asserts unconscionability is entitled to reasonable attorney's fees.¹⁰¹

4. *Limiting "Hell or High Water" Protections of Finance Lessor*

Several provisions do this:

- Section 2A-221: Where required and identified goods are damaged

⁹⁵ Cf. U.C.C. § 2A-407 (2002) (providing a statutory "hell or high water" provision for finance leases).

⁹⁶ U.C.C. § 2A-209.

⁹⁷ *Id.* § 2A-103(1)(g)(iii)(D).

⁹⁸ *Id.* § 2A-103 cmt.

⁹⁹ See *infra* Part IV.B.4 (discussing the limitation on choice of law and venue pursuant to the U.C.L.A. section 108). Subject to limitations, the U.C.L.A. provision also permits choice of the law of the jurisdiction where the goods are received by the lessee. U.C.L.A. § 108 (2002).

¹⁰⁰ U.C.C. § 2A-108(2).

¹⁰¹ *Id.* § 2A-108(4). The amount of the consumer's attorney's fee award is not controlled by the amount of recovery on the underlying claim. *Id.* § 2A-108(4)(c). However, if the consumer's claim is found groundless, the consumer is liable for the attorney's fees of the lessor or other holder of the lease. *Id.* § 2A-108(4)(b). Despite the breadth of this provision, at least one court has held that Article 2A unconscionability may only be asserted defensively, and may not serve as the basis for an affirmative claim by a lessee. *Mitchell v. Ford Motor Credit Corp.*, 68 F. Supp. 2d 1315, 1318 (N.D. Ga. 1998).

before delivery, a consumer lessee in a finance lease may choose to go forward with the lease with due allowance on the rent.¹⁰²

- Section 2A-406(1)(b): Where a lessor's performance is excused, a consumer lessee in a finance lease may demand an available quota with allowance on the rent.¹⁰³

- Section 2A-407: This statutory "hell or high water" clause for finance leases does not prevent a consumer lessee from asserting claims, for example, for breach of warranty, against the finance lessor.¹⁰⁴

- Section 2A-517(2): Preserves a consumer lessee's right to revoke acceptance for contract defaults by the finance lessor.¹⁰⁵

5. Notice Concerning Subleasing

To restrict transfer of a consumer leasehold interest, or to make it an event of default, section 2A-303(7) requires that the lease provision must be specific, in writing, and conspicuous.¹⁰⁶

6. Fixture Priority

Under section 2A-309(5)(a), a lessor has priority over a real estate interest in removable domestic appliances that become fixtures.¹⁰⁷

7. Liquidated Damages Cap

Section 2A-504(3)(b) caps a consumer lessee's liability for liquidated damages when the lessor justifiably withholds delivery on the lessee's default or insolvency.¹⁰⁸

8. Lessee's Notice of Breach

Under section 2A-516(3)(b), a consumer lessee is not barred from any

¹⁰² Miller, *supra* note 93, at 972. This is to preserve even a somewhat "frustrated bargain" for the consumer lessee. *Id.*

¹⁰³ U.C.C. § 2A-406(1)(b). This would allow a consumer lessee to salvage a portion of the lease bargain, where a commercial finance lessee would not have that option.

¹⁰⁴ *Id.* § 2A-407 cmt. 2. In particular, the U.C.C. states "[t]hat a [finance lease] consumer be obligated to pay notwithstanding defective goods or the like is a principle that is not tenable under case law . . . state statute . . . or federal statute." *Id.*; see also Miller, *supra* note 93, at 970 (questioning whether if as a matter of policy the statutory "hell or high water" provision cannot be invoked in a consumer lease, can a contractual clause to the same effect be valid, and determining that this would "be covered by law outside Article 2A"). See generally discussion *infra* Part VII.B.4 (discussing U.C.L.A. § 305(b)).

¹⁰⁵ U.C.C. § 2A-517(2) (noting that the consumer cannot be forced to re-accept cured goods). See generally U.C.C. § 2A-517 (1995), reprinted in 1998 SELECTED COMMERCIAL STATUTES 885 (showing the 1990 amendment to Article 2A).

¹⁰⁶ U.C.C. § 2A-303(7).

¹⁰⁷ *Id.* § 2A-309(5)(a). This would seem to benefit a consumer lessee only marginally, perhaps by encouraging dealers to furnish consumer appliances as fixtures on a lease basis.

¹⁰⁸ *Id.* § 2A-504(3)(b). The cap is the lesser of twenty percent of the present-valued total rent, or \$500. *Id.*

warranty remedy by failing to give the lessor notice of claims for infringement or the like.¹⁰⁹

Frankly, these items differentiate consumer leases somewhat, but hardly add much substantive protection against oppressive lease terms, deceptive marketing practices, or heavy-handed lease enforcement. Even the limitations on finance leases are largely academic, as not many consumer leases are structured as finance leases. In most respects, therefore, the U.C.L.A. will operate as a superstructure atop the groundworks of U.C.C. Article 2A. To the extent the U.C.L.A. requires or prohibits more than Article 2A, the U.C.L.A. prevails.¹¹⁰

The linkage between Article 2A and the U.C.L.A. is as much political as legalistic. When the sponsors of the U.C.C. began overhauling that statute in the 1980s, they faced significant political tensions and struggles between those wanting to preserve the U.C.C. as a "commercial" code, and others insisting on the need to include real consumer protections in that code.¹¹¹ As we have seen, Article 2A was drafted, promulgated, and widely enacted with only a handful of tweaks for consumer leases. The commissioning of the U.C.L.A. drafting project was in large measure a response to those tensions. It was also something of an experiment for the N.C.C.U.S.L., to see if it could successfully produce a "uniform" consumer protection statute that would be written in light of and in relation to, but outside of the Uniform Commercial Code.¹¹²

D. State Consumer Leasing Statutes

More than twenty states have on their books some legislation dealing with long term leases of consumer goods.¹¹³ It is an eclectic variety of leg-

¹⁰⁹ *Id.* § 2A-516(3)(b). The rationale is that consumers may not appreciate the need to give notice of infringement-type claims, and a remedy bar could "become a trap for the unwary." Miller, *supra* note 88, at 974. For other lessor defaults, consumer lessees still must give notice "or be barred from any remedy." U.C.C. § 2A-516(3)(a).

¹¹⁰ See discussion *infra* Part IV.B.5 (discussing U.C.L.A. section 106).

¹¹¹ See Marion E. Benfield, Jr., *Consumer Provisions in Revised Article 9*, 74 CHI.-KENT L. REV. 1255 (1999) (explaining that concern for addressing consumer transaction was substantive and political); Jean Braucher, *Deadlock: Consumer Transactions*, 73 AM. BANKR. L.J. 83 (1999) (stating that consumer transactions in Revised Article 9 raise political considerations); Symposium, *Perspectives on the Uniform Laws Revision Process*, 52 HASTINGS L.J. 603 (2001) (exploring the revision of Article 2). Anyone who has been conscious over the past dozen or so years must be aware of the commercial versus consumer battles that characterized the redrafting of U.C.C. Article 9 (Secured Transactions), and that contributed, in part, to the collapse of the "progressive" revision of U.C.C. Article 2 in 1999. In the Article 9 setting, while the new article has been adopted nationwide, there are numerous non-uniform amendments from state to state, mostly with respect to consumer issues.

¹¹² See 2002 Conn. Pub. Acts 02-131 (Reg. Sess.) (adding Article 2A on leases to the U.C.C.). Connecticut was the first test of this theory. Connecticut had for many years resisted enacting U.C.C. Article 2A, in part because it lacked sufficient consumer protections. Connecticut is the first state to enact the U.C.L.A., and, almost simultaneously, it enacted Article 2A (HB 5653) in 2002.

¹¹³ CAL. CIV. CODE §§ 2985.7-2992 (West 2002) (providing the "California Vehicle Leasing

Act." *Enacted*: 1976, revised 1984. *Coverage*: Motor vehicle leases only. *Scope*: Extensive regulation of advertising, disclosures, lease terms; prohibited lease provisions and practices; early termination; private enforcement.); COL. REV. STAT. §§ 5-1-101 to 5-1-303 (2002) (providing the "Colorado Consumer Credit Code," *Enacted*: 1971. *Coverage*: All goods. *Scope*: See discussion of the U.C.C.C.); CONN. GEN. STAT. §§ 42-270 to 42-271a (2001) (providing the "Long Term Leasing of Motor Vehicles" act. *Enacted*: 1995. Providing procedure for assessing excess wear and tear); CONN. GEN. STAT. §§ 42-158a to 42-158g (2001) (providing the "Noncommercial Motor Vehicle Lease Agreements," *Enacted*: 1999 (lease rate disclosure). These are now subsumed in, or repealed by, CONN. U.C.L.A.); FLA. STAT. ANN. §§ 521.001-521.006 (West 2002) (providing the "Motor Vehicle Lease Disclosure Act." *Enacted*: 1995. *Coverage*: Motor vehicle leases only. *Scope*: minimal disclosures concerning capitalized cost and trade-in); HAW. REV. STAT. §§ 481L-1 to 481L-4 (2001) (providing the "Motor Vehicle Lease Disclosure Act." *Enacted*: 1997. *Coverage*: Motor vehicles only. *Scope*: Disclosure (following Regulation M)); 815 ILL. COMP. STAT. ANN. §§ 636/1-95 (West 2002) (providing the "Motor Vehicle Leasing Act." *Enacted*: 1996. *Coverage*: Motor vehicles only. *Scope*: Disclosure; limitations on terms and practices; early termination; excess wear and tear; enforcement); IND. CODE ANN. §§ 9-23-2.5-1 to 9-23-2.5-13 (Michie 2002) (providing the "Disclosures Required in Motor Vehicle Leases." *Enacted*: 1996. *Coverage*: Motor vehicles only. *Scope*: minimal disclosures only); IND. CODE ANN. §§ 24-4.5-1-101 to 24-4.5-1-303 (Michie 2002) (providing the "Indiana Consumer Credit Code." *Enacted*: 1971. *Coverage*: All goods. *Scope*: Disclosures pursuant to federal law; and, see discussion of U.C.C.C.); IOWA CODE ANN. §§ 537.1101-537.7103 (West 2002). (providing the "Iowa Consumer Credit Code." *Enacted*: 1974. *Coverage*: All goods. *Scope*: Disclosures parallel to federal law; and, see discussion of U.C.C.C.); KAN. STAT. ANN. §§ 16a-1-101 to 16a-9-102 (2001) (providing the "Kansas Consumer Credit Code." *Enacted*: 1974. *Coverage*: All goods. *Scope*: Disclosures parallel to federal law; and, see discussion of U.C.C.C.); LA. REV. STAT. ANN. §§ 9:3301-9:3342 (West 2002) (providing the "Lease of Movables Act." *Enacted*: 1985. *Coverage*: Commercial and consumer leases of all movables. *Scope*: Authorizations and limitations for various charges and rebates; restrictions on repossession); ME. REV. STAT. ANN., tit. 9-A, §§ 1-101 to 11-122 (West 2001) (providing the "Maine Consumer Credit Code." *Enacted*: 1973. *Coverage*: All goods. *Scope*: Disclosures parallel to federal law; and see discussion of U.C.C.C.); MD. CODE ANN., Commercial Law, §§ 14-2001 to 14-2010 (2002) (providing for "Consumer Motor Vehicle Leasing Contracts." *Enacted*: 1995. *Coverage*: Motor vehicles only. *Scope*: Disclosure; limitations on terms and practices; warranties; early termination; excess wear and tear; enforcement.); MASS. GEN. LAWS ANN. ch. 93, §§ 90-93 (West 2002) (providing for "Written Leases or Rental Agreements of Personal Property Used Primarily for Household or Family Use," *Enacted*: 1986. *Coverage*: All personal property. *Scope*: Disclosure, similar to federal Regulation M); MICH. COMP. LAWS § 445.991-445.995 (2001) (providing for "Requirements of Lease Contracts Involving Motor Vehicles." *Enacted*: 1990. *Coverage*: Motor vehicles only. *Scope*: Requires notice to consumer concerning early termination); N.H. REV. STAT. ANN. §§ 361-D:1 to 361-D:28 (2002) (providing for "Motor Vehicle Leasing." *Enacted*: 1996. *Coverage*: Motor vehicles only. *Scope*: Disclosures pursuant to federal Regulation M; selected limitations on terms and practices); N.J. STAT. ANN. §§ 56:12-60 to 56:12-74 (West 2002) (providing the "Consumer Protection Leasing Act." *Enacted*: 1994. *Coverage*: Motor vehicles only. *Scope*: Disclosure pursuant to federal Regulation M; limitations on excess wear and tear charges, and spot delivery practices); N.Y. PERS. PROP. LAW §§ 301-353 (McKinney 2002) (providing the "Motor Vehicle Retail Installment Sales Act." *Enacted*: 1995. *Coverage*: Motor vehicles only. *Scope*: Some disclosure; limitations on terms and practices; early termination; excess wear and tear; enforcement); OKLA. STAT. ANN. tit. 14A, §§ 1-101 to 9-101 (West 2003) (providing the "Oklahoma Consumer Credit Code." *Enacted*: 1969. *Coverage*: All goods. *Scope*: Disclosures parallel to federal law; and, see discussion of U.C.C.C.); S.C. CODE ANN. §§ 37-1-101 to 37-16-90 (Law. Co-op. 2002) (providing the "South Carolina Consumer Protection Code." *Enacted*: 1976. *Coverage*: All goods. *Scope*: Disclosures parallel to federal law; and, see discussion of U.C.C.C.); WASH. REV. CODE ANN. §§ 63.10.010 to 63.10.902 (West 2002) (providing the "Consumer Leases Act." *Enacted*: 1983, revised 1996. *Coverage*: All personal property. *Scope*: Disclosure pursuant to federal Regulation M); W. VA. CODE ANN. 46A-1-101 to 46A-8-102 (Michie 2002) (providing the "West Virginia Consumer Credit and Protection Act." *Enacted*: 1974. *Coverage*: All goods. *Scope*: Disclosures pursuant to federal law; and see discussion of U.C.C.C.); WIS. STAT. ANN. §§ 429.101-429.301 (West 2001) (providing the "Motor Vehicle Consumer Leases Act." *Enacted*: 1995. *Coverage*: Motor vehicles only. *Scope*: Some disclosure; limitations on terms and practices; early termination; excess wear and tear; enforcement); WIS. STAT. §§ 422-101 to 422-506 (West 2001) (providing that the "Wisconsin Consumer Act" applies to "consumer leases" similarly to the U.C.C.C. states; WYO. STAT. ANN. §§ 40-14-101 to 40-14-702 (Michie 2001) (providing the "Wyoming Uniform

isolation, often rather narrow in focus, and much of it addressed to motor vehicle leases. Almost all of these state leasing acts require disclosures, either by incorporating the federal Regulation M rules by reference, or by requiring additional disclosures beyond the federal ones.¹¹⁴ Several of these state statutes are fairly expansive in scope, addressing issues such as early termination liability, excess wear and use, and a variety of matters also dealt with in the U.C.C.A.¹¹⁵ Without attempting a comprehensive and comparative analysis of all state statutes, it is possible to see similarities and differences.¹¹⁶

As is apparent, a number of states have enacted, or mimicked portions of, the U.C.C.C. This was the N.C.C.U.S.L.'s major effort, first in 1968 and then through a revised version in 1974, to bring some legal order and to remove artificial barriers to competition in the consumer finance markets. Consumer leasing was then in its infancy, and it is therefore remarkable, with more than thirty years of hindsight, to see how conscious the U.C.C.C. drafters were of leasing issues.

The U.C.C.C. deals with the following aspects of consumer leases of goods:¹¹⁷

1. *Disclosure and Advertising*

Sections 3.202 and 3.209 set out rules for transactional disclosure and advertising similar to the federal Consumer Leasing Act. These sections are largely displaced by the later-enacted federal law, which preempts any inconsistent state law rules.

Consumer Credit Code." *Enacted*: 1971. *Coverage*: All goods. *Scope*: Disclosures pursuant to federal law; and, see discussion of U.C.C.C.).

¹¹⁴ See sources cited *supra* note 113; see NAT'L CONSUMER L. CTR., *THE COST OF CREDIT: REGULATION AND LEGAL CHALLENGES* § 7.5.3.2 (2d ed. 2002) (explaining the type of disclosure requirements). With the substantial overhaul of Regulation M in 1996, many of these states have had to revise their disclosure requirements to maintain consistency with the federal law. See Kenneth J. Rojc & Thomas K. Juffernbruch, *State Law Response to the New Regulation M*, 53 BUS. LAW. 1027, 1027-28 (1998) (discussing the need for states to amend their laws to conform to the revised Regulation M).

¹¹⁵ See sources cited *supra* note 113. By contrast, almost every state regulates rent-to-own, or "rental-purchase," transactions. See NAT'L CONSUMER L. CTR., *THE COST OF CREDIT: REGULATION AND LEGAL CHALLENGES* § 7.5.3.2. (2d ed. 2002) (outlining the states that have rent-to-own statutes and providing information regarding disclosure requirements).

¹¹⁶ This list does not include some states where narrow lease provisions pop up in isolation within a more generic consumer protection law. See, e.g., NEB. REV. STAT. § 87-302 (1999) (including referral sales and leases in a list of deceptive trade practices); TENN. CODE ANN. § 47-18-702 (2001) (subjecting a "lease of goods" to a cooling-off period when marketed door-to-door); UTAH CODE ANN. § 70C-2-203 (2001) (prohibiting a lessor from taking a security interest in a dwelling).

¹¹⁷ States adopting at least some of these U.C.C.C.-based protections are Colorado, Indiana, Iowa, Kansas, Maine, Oklahoma, South Carolina, West Virginia, Wisconsin, and Wyoming, but not all of these states have necessarily adopted all of the "lease" provisions from the uniform act. See sources cited *supra* note 113. The U.C.C.C. definition of "consumer lease" refers to a "lease of goods," hence, it is not limited to motor vehicles. U.C.C.C. § 1.301(14)(a) (2002).

2. *Co-signer Notice*

Section 3.208 requires a warning notice to a co-signer on any "consumer credit transaction," which includes a consumer lease.¹¹⁸

3. *Limits on Lessor Remedies*

The U.C.C.C. prohibits a lessor from taking or exercising:

- a security interest (other than a security deposit);¹¹⁹
- an assignment of earnings,¹²⁰ or pre-judgment wage garnishment.¹²¹
- a confession of judgment.¹²²

4. *Anti-holder-in-due-course (Assignee Liability) Rules*

In combination, sections 3.307, 3.404, and 3.405 eliminate holder-in-due course protections for assignees of consumer lease obligations.¹²³

5. *Ban on Referral Inducements*

Section 3.309 bans the use of "referral" inducements with consumer lessees. This potentially deceptive technique promises rebates or discounts to a lessee who furnishes names of other prospective customers, but the rebates or discounts seldom materialize.

6. *Limit on Lessee Liability at Lease Expiration*

Section 3.401 imposes a limit of two monthly payments on the amount a lessee must pay at lease expiration.¹²⁴

7. *Unconscionability*

Section 5.108 imposes an unconscionability boundary on lease terms, including unconscionable inducements or collection practices.

8. *Restraints on Repossession*

The sequence of sections 5.109 through 5.112 limit the circumstances constituting lessee default, provide a mechanism for the consumer to cure a payment default, and permit self-help repossession only if "possession can

¹¹⁸ See U.C.C. § 1.301(13) (2002) (defining "consumer credit transaction").

¹¹⁹ *Id.* § 3.301(2).

¹²⁰ *Id.* § 3.305(1).

¹²¹ *Id.* § 5.104.

¹²² *Id.* § 3.306.

¹²³ See discussion *infra* text accompanying note 467 (explaining that state law limitations like these are important since the FTC Holder Rule does not appear to cover true lease transactions).

¹²⁴ See discussion *supra* text accompanying note 72 (discussing how this limitation prevents possibly unexpected balloon obligations and also effectively takes the sting out of high residual value liabilities in open-end leases).

be taken without entry into a dwelling and without the use of force or other breach of the peace.”¹²⁵

9. *Venue for Collection Actions*

Under section 5.113, collection actions against the consumer may be brought only in the county of the consumer's residence.

In addition, credit insurance is regulated under Article 4 of the U.C.C.C., consumers have private remedies for violations of the U.C.C.C. under Part 2 of Article 5, and the enforcement powers of the Administrator under Article 6 apply across the board to all consumer credit transactions (which include leases).

Versions of most of these U.C.C.C. provisions resurface in the new U.C.L.A. Presumably a state enacting the U.C.L.A. would therefore want to repeal or otherwise nullify the U.C.C.C. provisions on consumer leases so as to avoid duplicative coverage.

E. *Other Relevant Consumer Protection Law*

Beyond the U.C.L.A., leases of consumer goods may also be affected by existing consumer protection laws other than the federal Consumer Leasing Act and explicit state leasing laws. But the question of coverage by, or integration with, other law can be difficult when that other law does not expressly state its applicability to consumer leases.

1. *Federal Regulations*

Numerous federal consumer protection laws apply unquestionably to the overall business of leasing, such as laws affecting financial information privacy,¹²⁶ credit reporting,¹²⁷ and debt collection.¹²⁸ However, there are also a number of other federal laws and regulations applicable to credit

¹²⁵ U.C.C.C. § 5.112 (2003).

¹²⁶ See Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801–6827 (2000) (providing the major statutory directive on consumer financial privacy). See generally Michael A. Benoit & Elena A. Lovoy, *Recent Federal and State Consumer Financial Privacy Developments*, 57 BUS. LAW. 1209 (2002) (discussing privacy compliance programs); *Symposium on Privacy*, 55 CONS. FIN. L. Q. REP. (2001) (addressing assorted privacy considerations).

¹²⁷ See Fair Credit Reporting Act, 15 U.S.C. §§ 1681–1681u (explaining that lessors have responsibilities under this Act both as users of credit reports and as furnishers of information to consumer reporting agencies); see also *id.* §§ 1681b(3)(A), 1681b(3)(F)(i) (showing that while the Fair Credit Reporting Act does not expressly refer to determining lease eligibility as a “permissible purpose,” it does authorize reports “in connection with a credit transaction,” and “in connection with a business transaction that is initiated by the consumer”).

¹²⁸ See Fair Debt Collection Practices Act (F.D.C.P.A.) §§ 801–818, 15 U.S.C. §§ 1692–1692o (providing for debt collection practices). Although this Act applies primarily to independent debt collectors, there are obligations and responsibilities for original creditors, and “creditor” includes “any person . . . to whom a [consumer] debt is owed.” *Id.* §§ 803(4), 1692a(4).

transactions, where the question of their extension to leases is unclear.

a. Equal Credit Opportunity Act ("E.C.O.A.")

Are lease transactions subject to the same proscriptions against invidious discrimination that apply to credit sales and loans? Even though leases and credit sales may be side-by-side alternatives for the same consumers, the same dealers, and the same goods, with discriminatory practices just as conceivable in one as in the other, the legal answer is "probably not, except in the west."

The federal E.C.O.A.¹²⁹ and its implementing Regulation B¹³⁰ broadly prohibit discrimination in the granting or pricing of credit,¹³¹ limit the types of information that may be requested from applicants or used in the evaluative process,¹³² and require creditors to give rejected applicants prompt notice of and reasons for that adverse action.¹³³ It *could* therefore affect the processing and underwriting of consumer leases in much the same way it affects conventional "credit" transactions.¹³⁴ Certainly, as a matter of policy, there is as much reason to protect from discrimination a consumer who leases a car from a dealer as a consumer who buys one on credit from the same dealer. Nevertheless, application of the E.C.O.A. to leases is neither self-evident nor explicit in statutory law, and there is insufficient case law or other guidance to provide a definite conclusion. The E.C.O.A. was first enacted in 1974, two years before the C.L.A. The E.C.O.A. applies its anti-discrimination mandate to "any aspect of a credit transaction,"¹³⁵ and imposes restraints on conduct by a "creditor."¹³⁶ When the C.L.A. was enacted in 1976, it said nothing about its relationship to the E.C.O.A. and was clearly treating leases as a distinctive form of financing.

The leading judicial interpretation regarding the E.C.O.A.'s applicability to leases appears in the Ninth Circuit decision, *Brothers v. First Leasing*.¹³⁷ The court acknowledged the literal limitation on E.C.O.A. coverage

¹²⁹ See 15 U.S.C. §§ 1691-1691f (setting forth the E.C.O.A.).

¹³⁰ See Regulation B, 12 C.F.R. §§ 202.1-202.17 (2002) (providing the regulation for implementing the Equal Credit Opportunity Act).

¹³¹ See 15 U.S.C. § 1691; Regulation B, 12 C.F.R. § 202.1 (explaining that the E.C.O.A. bars discrimination based on race, color, religion, national origin, sex or marital status, or age, or because the applicant's income derives from public assistance or the applicant has exercised a right under the Consumer Credit Protection Act); see also 12 C.F.R. § 202.2(z) (defining "prohibited basis").

¹³² See Regulation B, 12 C.F.R. § 202.5 (providing rules for gathering application information).

¹³³ See *id.* § 202.9 (explaining notification requirements).

¹³⁴ See generally DEE PRIDGEN, CONSUMER CREDIT AND THE LAW, ch. 3 (Clark Boardman ed., 1998); NAT'L CONSUMER L. CTR., CREDIT DISCRIMINATION, § 2.2.1 (2d ed. 2001) (explaining the coverage of E.C.O.A.).

¹³⁵ See E.C.O.A., 15 U.S.C. § 1691.

¹³⁶ *Id.* § 1691a(e) (defining the term creditor).

¹³⁷ See *Brothers v. First Leasing*, 724 F.2d 789, 790 (9th Cir. 1984) (addressing whether the E.C.O.A. applies to consumer leases).

to "credit" transactions.¹³⁸ Yet, since the C.L.A. was added as a new chapter to the Truth in Lending Act, and since the E.C.O.A. and the T.I.L.A. are both titles under the umbrella Consumer Credit Protection Act, the Ninth Circuit concluded the E.C.O.A. applied to the auto lease in the case:

In view of the strong national commitment to the eradication of discrimination in our society, we see no reason why Congress would have wanted to subject the leasing of durable consumer goods to regulation under the disclosure provisions of the Consumer Credit Protection Act, but to exclude those transactions from the scope of the antidiscrimination provisions of that Act It is far more reasonable to conclude that Congress thought that an express amendment was unnecessary because the E.C.O.A. on its face applies to all credit transactions and, therefore, the language already in the Act was broad enough to cover consumer leases.¹³⁹

The problem with *Brothers* is that it proves too much. If a lease is inherently a form of credit (at least for anti-discrimination purposes), then all leases should be subject to the E.C.O.A.—real estate leases, commercial equipment leases, rent-to-own transactions, and so forth.¹⁴⁰ The court's formal holding applies only to the narrower class of "consumer leases" as defined in the federal C.L.A.,¹⁴¹ but the court intimates quite clearly that the E.C.O.A. is written expansively enough to apply to leases outside of the coverage of the C.L.A.¹⁴² Shortly thereafter, in the course of amending Regulation B, the Federal Reserve Board criticized *Brothers* for interpreting the E.C.O.A. term "credit" "too broadly," and declined to apply the E.C.O.A. to leases by regulation.¹⁴³ Instead, the Federal Reserve Board

¹³⁸ *Id.* at 794.

¹³⁹ *Id.* There was a sympathetic but strong dissent against the majority's expansive reading of the statutes. *Id.* at 796 (Canby, J., dissenting). As the Senate staff person handling the federal C.L.A. and E.C.O.A. Amendments bills in 1975-76, I do not recall any congressional discussion about whether E.C.O.A. applied to leases and I do not mention the issue in my contemporaneous account of that legislation. Ralph J. Rohner, *Consumer Credit Legislation in the Ninety-Fourth Congress—and A Look Ahead*, 9 U.C.C. L.J. 307 (1977) (providing an account of the legislative action taken by Congress regarding the E.C.O.A.).

¹⁴⁰ See Regulation B, 12 C.F.R. §§ 202.1-202.17 (2002). Although often thought of as a consumer protection law, the E.C.O.A. applies to all forms of credit regardless of purpose, amount, or the circumstances of the applicant or debtor, although differing technical compliance rules for "consumer credit" transactions are introduced in Regulation B.

¹⁴¹ See *Brothers*, 724 F.2d at 792 n.7 ("[C]onsumer lease" under the C.L.A. is one to an individual, for consumer purposes, for more than four months, and for a total obligation of \$25,000 or less).

¹⁴² See *id.* at 795 n.14 (stating that "[t]he language of the E.C.O.A. is much broader than that of the T.I.L.A. . . . The language of the E.C.O.A., on its face, imposes no [T.I.L.A.- or C.L.A.-based] limitations on 'credit transactions'").

¹⁴³ Regulation B, 50 Fed. Reg. 48,018, 48,020 (Nov. 20, 1985).

(the "FRB") said it would monitor the leasing markets for evidence of discriminatory practices, and propose regulatory or statutory change as appropriate.¹⁴⁴ No such proposals have emerged from the Board, and two federal district courts have split on whether to follow *Brothers*.¹⁴⁵

So we can say the following: (i) the E.C.O.A. apparently applies to "consumer leases" (within C.L.A.) in the Ninth Circuit, (ii) the E.C.O.A. may apply to non-consumer leases in the Ninth Circuit, (iii) the Federal Reserve Board believes the E.C.O.A. does not apply to leases at all, and (iv) other judicial authority is inconclusive. Maybe discriminatory practices are not a problem in lease markets; maybe they are.¹⁴⁶ Prudence may induce lessors and leasing companies to include E.C.O.A. compliance in operating guidelines and checklists where they can, and there is evidence they do so.¹⁴⁷ Perhaps some day Congress will clarify the E.C.O.A.'s scope with respect to leases.¹⁴⁸

b. Magnuson-Moss Warranty Act

Since 1976, the Magnuson-Moss Warranty Act ("M.M.W.A.") has imposed a layer of federal law on the disclosure and content of consumer product warranties.¹⁴⁹ Basically, any supplier of a consumer product that furnishes a written warranty on that product must explain the warranty terms and label the warranty "full" or "limited."¹⁵⁰ Where a written warranty is provided, the warrantor may not disclaim the implied warranties that arise under state law.¹⁵¹ Above certain amounts, actions may be

¹⁴⁴ *Id.* at 48,018.

¹⁴⁵ Compare *Ferguson v. Park City Mobile Homes*, No. 89-C1909, 1989 WL 111916, at *3 (N.D. Ill. Sept. 18, 1989) (holding that the E.C.O.A. applies to lease of a mobile home site, i.e., real estate), with *Liberty Leasing v. Machamer*, 6 F. Supp. 2d 714, 720 (S.D. Ohio 1998) (holding that the E.C.O.A. does not apply to a vehicle lease).

¹⁴⁶ As of summer 2002, there were a number of pending lawsuits against the major auto finance companies, alleging discrimination in the pricing of their products. The theory could apply to leases as well as credit sales. See generally *Coleman v. Gen. Motors Acceptance Corp.*, 296 F.3d 443 (6th Cir. 2002) (wherein class certification was reversed, and the cause remanded); *Jones v. Ford Motor Credit Co.*, No. 00 Civ. 8330 (LMM), 2002 WL 88431, at *1 (S.D.N.Y. Jan. 22, 2002) (denying defendants' motion to dismiss); *Rodriguez v. Ford Motor Credit Co.*, No. 01-C8526, 2002 WL 655679, at *6 (N.D. Ill. Apr. 19, 2002) (denying motion to dismiss).

¹⁴⁷ Lessors were exercising this kind of prudence even before the *Brothers* decision. See *Brothers*, 724 F.2d at 791 (explaining that the defendant leasing company was giving reasons for denial—an E.C.O.A. requirement—using forms "almost identical" to those prescribed by Regulation B). Lessors may also be subject to state anti-discrimination laws.

¹⁴⁸ Theoretically, the drafters of the U.C.L.A. might have included anti-discrimination provisions in the Act expressly, or might have "borrowed" the federal standards from the E.C.O.A. (as the U.C.L.A. borrows disclosure rules from the federal C.L.A.). To the best of my recollection, the issue of E.C.O.A. applicability was never discussed in the U.C.L.A. drafting process.

¹⁴⁹ See Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-2312 (2000) (codifying the provisions of the 1976 Act).

¹⁵⁰ *Id.* § 2303.

¹⁵¹ *Id.* § 2308.

brought in federal courts, and a victorious consumer litigant may be awarded costs and attorney's fees.¹⁵² The principal impact of the M.M.W.A. is on the manufacturer warranties that typically accompany the goods from factory through retailer to the end-user consumer.

Thus *buyers* of consumer goods get the benefit of the generic warranty rules in the U.C.C. Article 2,¹⁵³ plus the overlay of disclosure and other protections of the M.M.W.A. Consumer lessees now may also claim generic warranty protections under the U.C.C. Article 2A.¹⁵⁴ The question then is, are consumer lessees also covered by the M.M.W.A.? As in the prior section on the E.C.O.A., there is no inherent reason why the M.M.W.A. *should not* apply to consumer leases. It is the same supplier's warranty, on the same car on the same premises of the same dealer, being acquired by the same consumer with the same general expectation of a reasonable level of quality in the goods.¹⁵⁵ Mechanically, the M.M.W.A. disclosure and other rules should operate no differently in a lease setting than in a sale.¹⁵⁶ Yet the best answer to the question whether the M.M.W.A. applies to leases is "doubtful."

The problem again is one of definitions. Nothing in the M.M.W.A., or in the Federal Trade Commission regulations interpreting it, expressly addresses coverage of leases.¹⁵⁷ The key terms in the M.M.W.A. seem to

¹⁵² *Id.* § 2310(d).

¹⁵³ See U.C.C. § 2-313 (2002) (providing rules regarding express warranties); *id.* § 2-314 (providing for implied warranties of merchantability); *id.* § 2-315 (providing for implied warranty of fitness for particular purpose); *id.* § 2-316 (addressing warranty disclaimers). If revised Article 2 is ever approved and adopted it will likely include new sections 2-313A and 2-313B, which recognize quality responsibilities undertaken by remote (non-privacy) sellers or based on a seller's advertising. See CONTRACT LAW: SELECTED SOURCE MATERIALS 164-66 (Steven J. Burton & Melvin A. Eisenberg eds., 2001) (providing proposed revisions to sections 2-313A and 2-313B).

¹⁵⁴ See U.C.C. § 2A-210 (providing for express warranty); *id.* § 2A-212 (regarding implied warranty of merchantability); *id.* § 2A-213 (providing implied warranty of fitness for particular purpose). Proposed revised section 2A-214(3) will impose new, clearer wording requirements for disclaimers of implied warranties in consumer leases. Lessees will also benefit indirectly if the pending revisions to Article 2 are adopted. New section 2-313A specifically extends the factory warranty (often the "warranty in the box," or in the glove compartment) through distributors and dealers to the ultimate "buyer or lessee." CONTRACT LAW: SELECTED SOURCE MATERIALS, *supra* note 153, at 164-65. New section 2-313B does the same for warranties on new goods based on a supplier's advertising. *Id.* at 165-66.

¹⁵⁵ In theory, a lessee may even have a marginally greater expectation of performance qualities than a buyer. A buyer may tolerate certain limitations in the quality of the goods in exchange for a bargain price or where the buyer expects to resell. A lessee, on the other hand, bargains explicitly for the right to "possession and use"—uninterrupted enjoyment—of the goods for the duration of the lease. The warranty parallelism between the U.C.C. Articles 2 and 2A belies any official recognition of this difference.

¹⁵⁶ Some difference in treatment may be unavoidable, for example, if the supplier's warranty by its terms runs only to a "buyer" or "purchaser," and not to a lessee. Nothing in the M.M.W.A. appears to preclude a supplier from limiting the beneficiaries of its warranty.

¹⁵⁷ See generally 16 C.F.R. §§ 700.1-700.12 (2002) (providing the FTC interpretations of the M.M.W.A.).

contemplate a consumer "buyer" rather than lessee.¹⁵⁸ On the other hand, the M.M.W.A. remedies are available to any "consumer," defined to include not only a "buyer" but anyone to whom the warranted product is transferred and anyone entitled to enforce a warranty under state law.¹⁵⁹ These latter phrases arguably pick up lessees. The case law is somewhat split, and has been described as "less than lucid"¹⁶⁰ on the subject. The most recent, and perhaps most authoritative, holding is that the M.M.W.A. does *not* apply to leases, primarily because of the definitional limitations just discussed, and despite the fact that a manufacturer's warranty was passed along to the lessee just as in a sale.¹⁶¹

The U.C.L.A. Drafting Committee was aware of the role of the M.M.W.A. for sales warranties and the uncertainty of its application to leases, but was more interested in seeing how the U.C.C. Article 2 and 2A revision processes would deal with consumer goods warranties. The eventual accommodation of the U.C.L.A. to the M.M.W.A. and the U.C.C. Article 2A is discussed below in connection with the U.C.L.A. section 310.¹⁶²

c. Federal Trade Commission Act

The Federal Trade Commission ("FTC") Act states the broad premise that "unfair or deceptive acts or practices in or affecting commerce are hereby declared unlawful."¹⁶³ This is a sweeping proscription of bad conduct that certainly can include consumer leases. Enforcement of this standard is assigned primarily to the FTC itself, which may seek cease-and-desist orders, injunctions, and restitution through administrative proceedings. The Commission could invoke this statutory mandate independently

¹⁵⁸ The M.M.W.A. is triggered when a supplier makes a "written warranty." See M.M.W.A., 15 U.S.C. § 2301(6)(A) (2000). This critical term is defined in part as "any written affirmation of fact or written promise made in connection with the *sale of a consumer product by a supplier to a buyer . . .*" *Id.* (emphasis added). A second part of the definition of "written warranty" seemingly omits the "buyer" requirement when it speaks of "any undertaking in writing in connection with the sale by a supplier of a consumer product . . ." *Id.* § 2301(6)(B). However, the tag line of the overall definition of "written warranty" requires that in all cases the supplier's undertaking must become "part of the basis of the bargain between a supplier *and a buyer for purposes other than resale* of such product" *Id.* § 2301(6) (emphasis added).

¹⁵⁹ *Id.* § 2301(3).

¹⁶⁰ See NAT'L CONSUMER L. CTR., CONSUMER WARRANTY LAW: LEMON LAW, MAGNUSON-MOSS, UCC, MOBILE HOME, AND OTHER WARRANTY STATUTES § 19.2.3 (2d ed. 2001).

¹⁶¹ *DiCintio v. DaimlerChrysler Corp.*, 768 N.E.2d 1121 (N.Y. 2002). *But see Freeman v. Hubco Leasing, Inc.*, 324 S.E.2d 462, 465, 468 (Ga. 1985) (holding that M.M.W.A. applied to a lease that obligated the lessee to purchase the car at lease end); *Bus. Modeling Techniques, Inc. v. General Motors Corp.*, 123 Misc. 2d 605, 606 (N.Y. Sup. Ct. 1984) (holding that a lessee is a consumer under the M.M.W.A.).

¹⁶² See *infra* Part VII.B.7.

¹⁶³ 15 U.S.C. § 45(a)(1) (2000).

to police leasing practices, but in recent years has confined itself to enforcing the specific strictures of the C.L.A. and Regulation M.¹⁶⁴

The FTC's enforcement jurisdiction does not include banks and other depository institutions.¹⁶⁵ But recently several of the bank regulatory agencies have asserted the authority to enforce the general FTC Act proscription against unfair or deceptive acts or practices against banks, though none of these instances has involved consumer leases.¹⁶⁶

d. FTC Trade Regulation Rules

There are several instances at the regulatory, rather than statutory, level where existing federal law may seem to extend consumer protections to lessees as well as buyers. Most of them involve FTC "trade regulation rules" that are specific applications of the "unfair or deceptive acts or practices" rubric just discussed.¹⁶⁷

One is the FTC "Holder Rule" that preserves a consumer's claims and defenses when the consumer's contract obligation is assigned or transferred to a secondary financier.¹⁶⁸ The Rule's purpose is to eliminate the holder-in-due-course doctrine that historically insulated assignees from transactional disputes with their consumer obligors. This repudiation of holder-in-due-course is accomplished by the mandatory inclusion in consumer contracts of a "NOTICE" that assignees take subject to the consumer's claims and defenses.¹⁶⁹ The Holder Rule seems at first glance to be explicitly applicable to leases, as the definition of "seller" includes anyone who "sells or leases goods . . . to consumers,"¹⁷⁰ and the substantive mandate of the Rule operates "[i]n connection with any sale or lease"¹⁷¹ of goods or services. But the Notice required by the Rule must appear only in a "consumer credit contract,"¹⁷² and the component definitions of this phrase ("fi-

¹⁶⁴ 15 U.S.C. § 1607(c). For purposes of FTC enforcement, a violation of the C.L.A. (as part of the T.I.L.A.) is considered a violation of the FTC Act. *Id.*

¹⁶⁵ 15 U.S.C. § 45.

¹⁶⁶ See OCC Advisory Letter, Subject: Guidance on Unfair or Deceptive Acts or Practices, at 3 (March 22, 2002) (providing guidance on how the FTC Act impacts banks), *available at* <http://www.occ.treas.gov/ftp/advisory/2002-3.doc> (last visited Nov. 9, 2002) (on file with the Connecticut Law Review); see also Letter from Alan Greenspan, Federal Reserve Board Chairman, to Rep. John J. LaFalce (May 30, 2002) (addressing application of the FTC Act to the banking industry), *available at* <http://www.federalreserve.gov/boarddocs/press/bcreg/2002/20020530/default.htm> (last visited Nov. 9, 2002) (on file with the Connecticut Law Review).

¹⁶⁷ See *supra* Part II.E.1.c.

¹⁶⁸ See FTC Trade Regulation Rule, Preservation of Consumers' Claims and Defenses, 16 C.F.R. pt. 443 (2002) (providing for the preservation of consumers' claims and defenses).

¹⁶⁹ See *id.* (providing for a notice requirement).

¹⁷⁰ *Id.* § 433.1(j).

¹⁷¹ *Id.* § 433.2.

¹⁷² *Id.*; see also *id.* § 433.1(i) (defining consumer credit contract).

nanced sale"¹⁷³ and "purchase money loan"¹⁷⁴) limit it to credit transactions covered by the T.I.L.A. and Regulation Z. The ostensible Holder Rule coverage of leases, therefore, is necessarily limited to "dirty leases" that are in fact credit sales under the T.I.L.A.¹⁷⁵ The U.C.L.A. deals with the holder-in-due-course, or assignee-liability, issue in section 305(b), discussed below at Part VII.B.4.

One might think that the FTC Credit Practices Rule¹⁷⁶ would be applicable or transferable to leases. It attacks a number of practices that historically have been troublesome in the consumer credit markets. The Rule:

- Prohibits or sharply curtails the inclusion of:
 - cognovit or confession of judgment clauses,
 - waivers of exemptions from attachment,
 - assignments of earnings, or
 - non-purchase money security interests in household goods;¹⁷⁷
- Requires an explicit notice to co-signers before they become obligated;¹⁷⁸ and
- Bars the "pyramiding" of late charges.¹⁷⁹

Wishes aside, it is a virtual certainty that the FTC Credit Practices Rule does *not* apply to leases. Partly this is because the FTC staff has said so.¹⁸⁰ Further, the Rule's critical definitions and requirements speak solely in terms of a "creditor," who may be either a "lender" or a "retail installment seller,"¹⁸¹ leaving little literal leverage to argue for the Rule's applicability to leases. It should not be surprising, then, to see that the U.C.L.A. in fact addresses the matters covered by the Credit Practices Rule.¹⁸²

¹⁷³ *Id.* § 433.1(e).

¹⁷⁴ *Id.* § 433.1(d).

¹⁷⁵ See *Jarvis v. S. Oak Dodge, Inc.*, 773 N.E.2d 641, 646 (Ill. 2002) (finding that the FTC Rule does not apply to leases); see also NAT'L CONSUMER L. CTR., UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 6.6.2.2.1 (4th ed. 1997) (stating that it is "[u]nclear . . . whether the Holder Rule applies to leases").

¹⁷⁶ FTC Credit Practices Rule, 16 C.F.R. pt. 444.

¹⁷⁷ See *id.* § 444.2.

¹⁷⁸ *Id.* § 444.3.

¹⁷⁹ *Id.* § 444.4. This refers to the practice of imposing a late charge on a current payment when the only delinquency is failure to pay a late charge on a prior late payment. See U.C.L.A. § 304(b) (2002) (prohibiting pyramiding of late charges).

¹⁸⁰ FTC Staff Advisory Letter [1980-1989 Transfer Binder] Consumer Cred. Guide (CCH) ¶ 96,165, at 85,632-33 (Mar. 18, 1986).

¹⁸¹ 16 C.F.R. § 444.1(a), (b), (f). Although the definition of "retail installment seller" refers to a "lease-purchase agreement," the FTC staff letter dismissed this as "merely denot[ing] a type of sale (not lease)." FTC Staff Advisory Letter, *supra* note 180, at 85,633.

¹⁸² See U.C.L.A. § 205 (requiring notice to cosigners), § 302 (prohibiting acceleration, requirements to confess judgment or authorize assignment of wages, and some types of repossession), 303 (defining allowed security interests), § 304 (restricting late charges and attorney's fees).

Another instance of existing federal regulation that may affect consumer leases is the FTC Door to Door Sales Rule.¹⁸³ As its official name suggests, the Rule requires that vendors give their customers a three-day cooling off period for transactions solicited by the vendor and consummated off the vendor's premises.¹⁸⁴ On the question whether the Rule applies to consumer leases, the devil again is in the definitions, with the clear tilt in favor of coverage.¹⁸⁵ The baseline term "door-to-door sale" expressly includes a "sale, lease, or rental of consumer goods,"¹⁸⁶ and there is a specific exclusion for "rental of real property,"¹⁸⁷ suggesting that leases of goods are included. Yet the substantive rule, and the mandatory Notice of Cancellation, speak only in terms of the "buyer,"¹⁸⁸ undefined in the Rule.

While there is little evidence of door-to-door, or off-premises, leasing of goods, one can envision those patterns occurring at boat or computer shows, or with respect to computers marketed in college dorms or similar settings away from the lessor's regular place of business. The FTC Rule was promulgated in 1972—thirty years ago—when door-to-door leasing was probably unknown or very rare. The Rule lacks some precision as to its application to leases, but a lessor would seem foolhardy to engage in door-to-door or off-premises leasing without compliance with the FTC Rule.

Beyond these examples are still other, broader federal regulatory rules that can affect the marketing of consumer leases. For instance, rules promulgated by the Federal Trade Commission restrict telemarketing practices,¹⁸⁹ and the FTC has issued guidelines on "bait and switch" advertising.¹⁹⁰ Whether these restraints are applicable to lease marketing depends,

¹⁸³ FTC Trade Reg. Rule, Cooling-Off Period for Sales Made at Homes or at Certain Other Locations, 16 C.F.R. § 429.

¹⁸⁴ *Id.* § 429.1. The Rule indicates that this includes "sales at the buyer's residence, or at facilities rented on a temporary or short-term basis, such as hotel or motel rooms, convention centers, fairgrounds and restaurants, or sales at the buyer's workplace or in dormitory lounges." *Id.* § 429.0(a). But the FTC has exempted from the Rule sellers of automobiles at temporary places of business—"auto fairs"—if they have a permanent place of business. Rule on Cooling-Off Period for Door-to-Door Sales, 53 Fed. Reg. 45,455, 45,456 (Nov. 10, 1988) (codified at 16 C.F.R. pt. 429).

¹⁸⁵ The original statement of purpose for the Rule clearly indicates an intent to cover leases. 37 Fed. Reg. 22,945 (Oct. 26, 1972). When the Commission sought comments on the Rule as part of its regulatory oversight responsibilities, it did not raise lease coverage as an issue. FTC Request for Comments Concerning Rule on Cooling-Off Period for Door-to-Door Sales, 59 Fed. Reg. 18,007, 18,008 (Apr. 15, 1994).

¹⁸⁶ 16 C.F.R. § 429.0(a).

¹⁸⁷ *Id.* § 429.0(a)(6).

¹⁸⁸ For example, the seller must furnish "the buyer" a copy of the contract containing a bold-face notice that "[y]ou, the buyer, may cancel this transaction. . . ." *Id.* § 429.1(a) (emphasis added).

¹⁸⁹ FTC Telemarketing Sales Rule, 16 C.F.R. §§ 310.3-310.4.

¹⁹⁰ FTC Guides Against Bait Advertising, 16 C.F.R. §§ 238.0-238.4.

as usual, on how each rule describes its own coverage.¹⁹¹ Does the FTC Telemarketing Rule apply to leases? Maybe. The critical term "telemarketing" is defined as "a plan, program, or campaign which is conducted to induce the purchase of goods or services by use of . . . telephones. . . ."¹⁹² Well, is a lessee a "purchaser"? The Rule does not elaborate. If we look to the U.C.C. for guidance, it defines "purchase" broadly to include any "voluntary transaction creating an interest in property."¹⁹³ But is the lessee's leasehold interest an "interest in property"? Maybe not, since the lessor retains full title. Still, Article 2A of the U.C.C. defines "leasehold interest" as "the interest of the lessor or the lessee under a lease contract."¹⁹⁴ Whatever the lessee acquires, it is an "interest" (in either the goods or the contract right to possession and use of them). So by this reasoning, the lessee may be a purchaser after all, and leasing is therefore a form of "telemarketing," and the Telemarketing Rule applies. Is that right? Yes, but you must also be willing to read "seller" to include a lessor, which is not too difficult because "seller" is defined as "any person who, in connection with a telemarketing transaction, provides, offers to provide, or arranges for others to provide goods or services to the customer in exchange for consideration."¹⁹⁵

2. Miscellaneous State Laws

In addition to U.C.C. Article 2A and any explicit consumer leasing legislation in the state, there are likely to be other laws that will or could have impact on the rights of consumer lessees. In most cases state laws in this category would continue to operate in connection with consumer leases, and would not be displaced or preempted by the U.C.L.A.

One example would be state door-to-door sales laws, comparable to the FTC Rule on that topic. Virtually every state has cooling-off laws for door-to-door selling.¹⁹⁶ While the U.C.L.A. does not include a door-to-door cooling-off provision as such, a "Legislative Note"¹⁹⁷ suggests that enacting states consider whether to bring leases under a separate state law for that purpose.

¹⁹¹ Even the generic FTC "bait and switch" guides leave uncertainty as to their applicability to leases. "[B]ait advertising" is defined as "an alluring but insincere offer to sell a product or service which the advertiser in truth does not . . . want to sell." *Id.* § 238.0 (emphasis added).

¹⁹² *Id.* § 310.2(u) (emphasis added).

¹⁹³ U.C.C. § 1-201(32) (2002).

¹⁹⁴ *Id.* § 2A-103(1)(m) (emphasis added).

¹⁹⁵ 16 C.F.R. § 310.2(r).

¹⁹⁶ See NAT'L CONSUMER L. CTR., UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 5.8 (5th ed. 2001).

¹⁹⁷ U.C.L.A. § 106 legis. n. 2 (2002).

Another example would be state "lemon laws" that provide specific consumer remedies for buyers of defective goods, usually limited to motor vehicles. Almost every state has such a law.¹⁹⁸ The lemon laws typically provide that the warrantor of the goods must either replace them or refund the purchase price if the warranty defects cannot be timely repaired, or the goods are out of service for an extended period.¹⁹⁹ Some of these laws expressly apply to leased vehicles,²⁰⁰ but many do not. In theory and policy, there seems no reason why state law should give less protection against "lemons" to consumer lessees than to buyers. The U.C.L.A. drafters did not undertake to write a lemon-law provision into the U.C.L.A., but did include a "Legislative Note" urging an enacting state to "consider amending its Lemon Law to afford the same protection to consumer lessees as well as buyers."²⁰¹

A third example of complementary, existing state law comprises the various state consumer fraud acts. These "little FTC Acts," like the federal model, typically prohibit "unfair or deceptive acts or practices,"²⁰² sometimes enumerate examples of bad practices, and usually provide for private recoveries as well as governmental enforcement by the Attorney General or comparable state official.²⁰³ The U.D.A.P. statutes are not uniform in scope of coverage, specificity of the substantive standards, or sanctions for violations, but together provide a basis for challenging merchant conduct that is factually offensive even if it is not forbidden by specific statutory or regulatory rules.²⁰⁴ Not surprisingly, these laws have frequently been invoked to challenge consumer leasing practices²⁰⁵ (for example, failure to credit the consumer with the agreed value of a trade-in). The U.C.L.A. clearly intends these general consumer fraud statutes to remain in place with respect to consumer leases. The U.C.L.A. specifically provides that it is "supplemented by other applicable statutory provisions,"²⁰⁶ and a Legis-

¹⁹⁸ See NAT'L CONSUMER L. CTR., CONSUMER WARRANTY LAW ch. 13 (2001).

¹⁹⁹ *Id.*

²⁰⁰ E.g., N.Y. GEN. BUS. LAW § 198-a(a)(2) (McKinney Supp. 2002).

²⁰¹ U.C.L.A. § 310 legis. n. 2.

²⁰² Hence the acronym "U.D.A.P." statutes.

²⁰³ See generally NAT'L CONSUMER L. CTR., UNFAIR AND DECEPTIVE ACTS AND PRACTICES (5th ed. 2001) (surveying U.D.A.P. statutes and their application).

²⁰⁴ *Id.*

²⁰⁵ For a collection of cases involving U.D.A.P. allegations in automobile leases, see *id.* § 5.4.8.

Examples include:

- misrepresentation that the transaction is a sale when it is a lease;
- mis-stating the amount of the down-payment;
- failure to disclose a marked-up cash price;
- misrepresenting that there is a purchase option;

Id. § 5.418.2.

²⁰⁶ U.C.L.A. § 106.

lative Note reminds any enacting state to "review its statutory treatment of unfair and deceptive acts and practices to assure that it covers consumer lease transactions."²⁰⁷

There is another category of existing state consumer protection laws where the relationship to the U.C.L.A. will be less clear. These are state laws, usually statutory but including judicial precedent, that are of more general applicability than just to consumer leases, but that are potentially overlapping or inconsistent with the U.C.L.A. As just noted, the U.C.L.A. expressly states that it is supplemented by other statutory law and "general principles of law and equity."²⁰⁸ But those other laws and principles are *not* applicable if they "are displaced by or inconsistent with" the U.C.L.A.²⁰⁹ Several examples may sharpen the issue:

1. If a state (like Connecticut) has a "plain language" law requiring all consumer contracts to be written in simple English,²¹⁰ or if a state requires non-English translations,²¹¹ nothing in the U.C.L.A. should affect the continuing applicability of those laws to consumer leases.²¹²
2. Some states follow a "single document" rule, requiring that all the essential terms of a consumer contract be contained in a single paper document.²¹³ The U.C.L.A. does not explicitly require such a single document.²¹⁴ Does the single-document rule continue to apply, or is it displaced for U.C.L.A. transactions?
3. A number of states have adopted rules or case law holdings on the handling of security deposits, some requiring that such deposits be kept in segregated accounts or that interest accrue in the customer's favor on such deposits.²¹⁵

²⁰⁷ *Id.* § 106 legis. n. 1.

²⁰⁸ *Id.* § 106.

²⁰⁹ *Id.*

²¹⁰ CONN. GEN. STAT. § 42-152 (2001).

²¹¹ *E.g.*, 815 ILL. COMP. STAT. ANN. § 505/2N (West Supp. 2002); CAL. CIV. CODE § 1632 (West Supp. 2002).

²¹² Section 42-156(a) of the Connecticut act provides that the "plain language" requirement does not affect any disclosures or notices specified by law. CONN. GEN. STAT. § 42-156(a).

²¹³ *E.g.*, California Motor Vehicle Leasing Act, CAL. CIV. CODE § 2985.8(a).

²¹⁴ Section 203 of the U.C.L.A. adopts by reference the disclosure content and format rules of the federal C.L.A. and Regulation M. Regulation M allows the disclosures to be made on a separate sheet. 12 C.F.R. § 213.3(a)(1) (2002). The U.C.L.A. allows at least some information "in a separate record accompanying the lease." U.C.L.A. § 203(c)(5) (addressing itemization of capitalized cost); *see also id.* § 301(b) (addressing spot delivery notice).

²¹⁵ *See Summary of Lease Security Deposit Cases*, 51 CONSUMER FIN. L. Q. REP. 284-88 (1997). The recurring argument in the cases is that, under pre-2001 U.C.C. section 9-207, the lessor held the

The U.C.L.A. specifically says that the holder is not required to pay interest on a security deposit,²¹⁶ and the Official Comments say that security deposits need not be "segregated or maintained in separate accounts."²¹⁷ How much, if any, of the other state law on security deposits remains applicable to consumer leases after U.C.L.A.?

This issue of the integration (or exclusion) of other law in consumer lease transactions is discussed further in connection with U.C.L.A. section 106, which is discussed below in Part IV.B.5.

F. *Contrasting Legal Environments for Leases and Credit Sales*

To summarize this section: Consumer leases and credit sales compete for the consumer's market choice. Both involve the consumer's acquisition and use of goods for personal, family or household purposes, with payments deferred over a period of time. Each form of consumer goods financing draws on the Uniform Commercial Code for its basic legal structure, including default rules on contract formation, warranties, performance, priorities, and remedies. Both leases and credit sales are subject to advertising and disclosure rules set by federal law. At this point, however, the legal environment for the two transaction forms begins to diverge.

As discussed in Parts II.B and II.E.1, there are a number of federal laws and regulations designed to protect consumers as debtors, i.e., as buyers on credit. But the extension of these laws and regulations to consumer lease transactions is often uncertain. At the state level, every jurisdiction has a range of protective laws for credit buyers, such as usury (interest rate) regulations and installment sales acts, which typically prescribe additional disclosures beyond those required by federal law, impose restraints on contract terms and remedies, limit repossession and foreclosure procedures, regulate insurance and other products sold as part of the credit sale, and usually provide for private enforcement and public administration. In addition, on the sale side are specialty laws such as the lemon laws for defective cars and cooling-off laws for door-to-door and similar sales settings. And there are almost everywhere special laws addressing rent-to-own transactions as a form of marketing that is effectively *sui generis*.

Except for the smattering of existing state laws on consumer leases, mostly affecting only motor vehicle leases, there has been no comparable—certainly no uniform—body of law for consumer leases equivalent to that described for credit sales in the prior paragraph. It is the general ob-

security deposit as collateral and so must segregate it and use reasonable care with respect to it, including investing it at interest and accounting for those earnings. This argument usually loses. Cf. *Turner v. Gen. Motors Acceptance Corp.*, 180 F.3d 451 (2d Cir. 1999).

²¹⁶ U.C.L.A. § 303(d).

²¹⁷ *Id.* § 303 cmt. 3.

jective of the U.C.L.A. to fill that role.

III. DRAFTING HISTORY OF THE U.C.L.A.

A. Study Committee Report

The deep background of the U.C.L.A. was touched on earlier.²¹⁸ Since the early 1980s, the National Conference of Commissioners on Uniform State Laws and the American Law Institute have been working on a substantial overhaul of the Uniform Commercial Code. The first piece of that overhaul was the drafting of a new Article 2A (Leases).²¹⁹ In the drafting process for that article, as for U.C.C. Article 9 (Secured Transactions) and Article 2 (Sales), there was recurring debate over the need to include consumer protection provisions in those articles of the *commercial* code, and if so, which and how many of them. Before and even after promulgation of Article 2A, N.C.C.U.S.L. apparently believed it would help spur adoption if that Article were left primarily commercial in scope, with consumer protections in leases to be dealt with in a separate uniform law. If this approach were successful for Article 2A, perhaps something similar could be done with Articles 2 or 9. Even outside of N.C.C.U.S.L. there were suggestions for a "model" Consumer-Lessee Protection Act.²²⁰

N.C.C.U.S.L. commissioned a Study Committee in early 1995, chaired by Commissioner Gerald Bepko, Chancellor of Indiana University (Indianapolis). That Study Committee canvassed knowledgeable people across the country and collected both scholarly and popular literature on leasing practices. The Committee's Report in July 1995 recommended the appointment of a drafting committee, and sketched the scope of what should be addressed in the drafting process:

The National Conference of Commissioners on Uniform State Laws ("N.C.C.U.S.L.") should establish a drafting committee to prepare a proposed Uniform Consumer Leasing Act. The drafting committee should be instructed to give first attention to substantive issues in an effort to provide a balance of interests between lessors and lessees of consumer

²¹⁸ See discussion *supra* Part II.

²¹⁹ Actually, what is now U.C.C. Article 2A began as the free-standing Uniform Personal Property Leasing Act. *Foreword to U.C.C. Article 2A, SELECTED COMMERCIAL STATUTES* 193 (West Group 1993).

²²⁰ See John J. A. Burke & John M. Cannel, *Leases of Personal Property: A Project for Consumer Protection*, 28 HARV. J. ON LEGIS. 115 (1991). This proposal was an outgrowth of New Jersey's consideration and enactment of U.C.C. Article 2A. N.J. LAW REVISION COMM'N, REPORT AND RECOMMENDATIONS ON CONSUMER LEASES (1989), at <http://www.lawrev.state.nj.us/rpts/clpa94.pdf> (last visited Nov. 23, 2002) (on file with the Connecticut Law Review). An even earlier exhortation to the California legislature appears in Joseph G. Gorman, Jr., Comment, *Automobile Leasing: A Subject for Legislative Consideration*, 13 U.C.L.A. L. REV. 138 (1965).

goods. In particular, the drafting committee should review issues addressed by states that have enacted or are considering enacting laws on this subject. During the drafting process, the committee should monitor the developments under the federal Consumer Leasing Act and Federal Reserve Board Regulation M, and the currently pending revision process for Regulation M. Before completing its work, the drafting committee should review Regulation M, determine whether any supplementary state law is desirable, and incorporate the results of their deliberations in the proposed Uniform Consumer Leasing Act.

In its charge to the Study Committee on Consumer Leasing, the N.C.C.U.S.L. Executive Committee chose to exclude "rent-to-own" arrangements from consideration. While the Study Committee honored this instruction, it feels compelled to suggest as part of its recommendation that any drafting committee appointed be given the authority to explore the points of comparability that may exist between the kinds of consumer leases to be covered and rent-to-own transactions. . . .

The drafting committee should be instructed to include in the proposed Uniform Consumer Leasing Act the lease to consumers of all types of tangible personal property. . . .

The drafting committee should exclude short-term leases. How to define the excluded transactions should be left to the drafting committee. A common provision in present state laws excludes leases of less than four months.²²¹

The Executive Committee of N.C.C.U.S.L. in late 1995 designated a Reporter for the project, appointed members of the Drafting Committee,²²² and designated Commissioners Robert Cornell of California and Justin Vigdor of New York as co-chairs.

B. Methodology and Schedule

The Drafting Committee first met in the spring of 1996, and met semi-annually thereafter until final approval of the U.C.L.A. at the N.C.C.U.S.L.

²²¹ NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, REPORT OF THE STUDY COMMITTEE ON A PROPOSED UNIFORM CONSUMER LEASING ACT 1-2 (July 1995).

²²² It was probably no accident that two of the original Drafting Committee members were Commissioners from Connecticut, which had been reluctant to act on U.C.C. Article 2A without assurance of adequate consumer protections being included.

annual meeting in August 2001. Announcements of the Drafting Committee meetings were distributed to a broad mailing list, and interested persons were invited to attend committee meetings as "observers." Over the full drafting period, scores of observers attended various meetings, but there was a core group of about ten who attended virtually every drafting session. These observers represented industry, consumer, academic, and regulatory perspectives, and far from being passive observers were welcomed as full-fledged participants in the discussions. And participate they did, both as critics of current draft language and as resources of information about current leasing practices and problems, and the rationales or cures for them.

Having been the Reporter and thus an "insider," it is difficult for this author objectively to appraise the drafting process. All involved worked hard. The co-chairs were patient but persistent in moving the project forward during each two-and-a-half day drafting session, while keeping the process open and collegial. There is a certain inefficiency in a process that is so open, and in which almost any issue can be re-opened at any time. There was also some turnover in Drafting Committee membership during the six-year drafting process; replacement members understandably were on a learning curve and wanted to be sure to understand, and free to revisit, issues previously thought to be resolved. As is too often the case, consumer representatives had difficulty getting financing for regular attendance at semi-annual meetings scattered over the country.²²³

The drafting methodology was straight-forward. The earliest drafts prepared by the Reporter were conglomerations of provisions taken from or patterned on the U.C.C. and the U.C.C.C., from the recently enacted state motor vehicle leasing laws, and from a "model" act derived from a New York law but refined by industry sponsors.²²⁴ There was a certain "everything including the kitchen sink" character to those early drafts.²²⁵ Within three or four meetings, however, the basic shape of the Act emerged, and it then became a process of debating and resolving issues and refining the statutory language. In addition to the on-site input from the observers, the Committee also received numerous written comments from a spectrum of interested parties. For each Drafting Committee meeting a new "clean" draft was prepared and circulated, reflecting changes from the prior meeting and highlighting issues and options for the upcoming session. Explanatory "Reporter's Notes" evolved during this process and became the basis for the Official Comments that accompany the Act.

²²³ This is a recurring problem. See Gail Hillebrand, *What's Wrong with the Uniform Law Process?*, 52 HASTINGS L.J. 631, 640-41 (2001).

²²⁴ Venable, Baetjer, Howard & Civiletti, LLP, *Motor Vehicle Consumer Lessee Protection Act, Commentary and Policy Discussion*, in CARLAW SPECIAL SUPPLEMENT (1995).

²²⁵ For non-insider perceptions of the process, see Joseph W. Gelb & Peter N. Cubita, *Toward a Uniform Consumer Leases Act*, 53 BUS. LAW. 1041 (1998).

C. *Official Approval, Finally*

Strategically, the early thinking was that the U.C.L.A. project could tag along behind the U.C.C. Articles 2 and 2A rewrites then under way, and borrow, adapt, or adjust to decisions made in connection with the "commercial" code. The U.C.L.A., in other words, could build on the best in the revised U.C.C. articles, and add other consumer protection provisions where the "commercial" code came up short. But as events occurred, the U.C.L.A. became its own engine, rather than a caboose on the Article 2 and 2A train. The U.C.L.A. was scheduled for its "first reading" in the summer of 1999, at the same N.C.C.U.S.L. meeting where it was hoped the aggressively revised U.C.C. Articles 2 and 2A would get final approval. But as the Article 2 and 2A projects slowed, and then imploded literally on the eve of N.C.C.U.S.L. discussion of them,²²⁶ the U.C.L.A. passed its first reading and the Drafting Committee anticipated final approval the following summer.

For various reasons, the scheduled second reading of the U.C.L.A. was deferred until the summer of 2001. In part this was to see if the log jam on U.C.C. Articles 2 and 2A would be breached so that, as originally planned, the U.C.L.A. could be fine-tuned for optimum mesh with those U.C.C. articles. In fact it was probably a good thing that the Drafting Committee had an extra year, because it met three more times in that interval and made some important adjustments in what became the final version of the Act.

Then, as the clock wound down to and through the final drafting session in May 2001, political reality surfaced. A number of industry groups²²⁷ advised that the member organizations would not accept the U.C.L.A. because of strong objections to many of its provisions as then drafted. "Enactability" has always been a N.C.C.U.S.L. principle of uniform laws drafting, and the question for the Drafting Committee and the Conference was how to proceed. Should they leave the Act as drafted and hope for the best in terms of Conference approval and state enactment, or begin a new round of negotiated compromises in hopes of garnering industry neutrality if not support? The Committee chose the latter path. By conference call and face-to-face meetings the Committee, with the industry

²²⁶ Revised Articles 2 and 2A had been approved by the American Law Institute ("A.L.I.") in May 1999. The day before they were to come to the N.C.C.U.S.L. floor in August that year, the leadership removed them from the agenda out of concern for their enactability, especially on the issue of scope of coverage as to software. The Reporters resigned, a new Drafting Committee undertook to do a scaled-back version of the revisions, and in August 2002 N.C.C.U.S.L. approved scope language that, it is hoped, will draw A.L.I. agreement and conclude the lengthy revision process. The saga, from the A.L.I. perspective, is told in *Final Attempt to Achieve U.C.C. Article 2 Amendments Underway*, A.L.I. REP., at 1 (Fall 2002).

²²⁷ Almost all were motor vehicle lessors and financiers.

groups and consumer representatives,²²⁸ worked out adjustments on a number of issues, to a point where the Committee co-chairs believed they had gotten general acceptance, or at least industry neutrality.²²⁹ By conference call on May 24, the Drafting Committee approved certain changes, and hoped that the decks were cleared for approval.

Not quite. Several weeks before the Conference gathered for its Annual Meeting at the Greenbrier in White Sulphur Springs, West Virginia, in August 2001, the industry coalition served notice that they still would be unable to support the Act without further revision on four specified points.²³⁰ An industry delegation appeared at the Greenbrier prepared to negotiate. Would the Committee engage them, or not? It would. The Committee co-chairs led the group through an almost non-stop three day exchange of drafts, revisions, proposals and counter-proposals that culminated in a number of revisions of the draft Act and a signed commitment from the industry coalition members that they would not oppose the Act in its final iteration either in the Conference or in the states.²³¹ The U.C.L.A. passed its second reading without dissent and was approved for promulgation to the states.²³² Whether the eleventh-hour modifications will influence the "enactability" of the Act remains to be seen.²³³

²²⁸ Key Observers from the consumer side participated in most of these exchanges and were kept apprised of each step in the process.

²²⁹ A memo from Drafting Committee Co-Chair Justin Vigdor to N.C.C.U.S.L. officers McLaugherty, Burnett, and Miller reviews this activity, concluding that "it seems we have reached some sort of a meeting of the minds," although "we have no ironclad commitments" from either side. (Mar. 22, 2001) (on file with Connecticut Law Review).

²³⁰ Letter from the Alliance of Automobile Manufacturers, the Association of International Automobile Manufacturers, the Association of Consumer Vehicle Lessors, and the American Financial Services Association ("AFSA"), to Comm'r Justin L. Vigdor (July 13, 2001) (on file with the Connecticut Law Review). Separate letters of opposition were circulated to the Commissioners by the National Automobile Dealers Association, the National Vehicle Leasing Association, and the AFSA. The four specific points of objection were: (1) class action exposure; (2) over-broad availability of statutory damages; (3) excessively long statute of limitations; and (4) lack of a safe harbor for early termination liability.

²³¹ Letter from representatives of the Alliance of Automobile Manufacturers, the Association of International Automobile Manufacturers, and the Association of Consumer Vehicle Lessors (Aug. 14, 2001) (on file with the Connecticut Law Review).

²³² At this point in the N.C.C.U.S.L. meeting the Reporter (this author) went home, believing the U.C.L.A. was finally finished. There was, however, one last flurry of objections, leading Conference officers to consider suspending approval of the U.C.L.A. This came not from the auto leasing companies but from the computer software industry, insisting that the U.C.L.A. not take or infer a position on its coverage of computer software and "smart goods" unless and until that coverage issue was resolved for U.C.C. Articles 2 and 2A. Since that issue is the one that had brought the Articles 2 and 2A revisions to a stand-still, failure of the U.C.L.A. loomed one more time. Happily, the issue was brokered to apparent agreement by including an additional Comment 8 to U.C.L.A. section 104, professing neutrality on coverage of software.

²³³ In Connecticut, where the U.C.L.A. was adopted in the spring of 2002, some of the industry coalition members actively supported the U.C.L.A.; none, apparently, opposed it openly. Leasing

D. *Intervening "Changed Circumstances"*

During the six years from the appointment of the original Study Committee to final approval of the U.C.L.A., there were several changes in the environment for consumer leases that can affect one's outlook on the need for—or adequacy of—a new consumer protection law.

One of these changes was the modernization of the federal Regulation M disclosure rules. The revision of that regulation conformed the disclosure compliance rules to current market practices, emphasized a more intelligible format, and resolved several disclosure issues that had been problematic in the case law. The leasing industry by and large took the position that with improved and streamlined disclosures in place, there simply was no compelling need for additional regulation of consumer leases through a uniform state law. Let the market work, they said, and let the federal disclosure rules provide sufficient "transparency" to prevent consumer abuse. At very least, the argument went, the Conference should hold off imposing an additional regimen of legal controls until we see how the new Regulation M works and whether there are real problems left to be addressed. The counterpoint, the Drafting Committee also heard, is that the federal C.L.A. only provides disclosure and so cannot deal with the array of lease terms and practices that need more substantive controls; a uniform state law can reach to problems or abuses not related to disclosure. The fact is that we have a significantly different disclosure regime in place now, compared to the pre-1998 period. No one yet knows how the current disclosures will obviate old problems, create new ones, or simply miss the mark of real leasing abuses.

The other sea change since the mid-1990s is economic, especially with respect to market forces affecting motor vehicle leases. Auto leasing was booming in the early part of the decade, with predictions that forty or even fifty percent of retail auto deliveries would be through leases. In retrospect, this sentiment was not only supported by market data, but consistent with the psychology and consumer expectations of the time: the economy is surging, let's upgrade our transportation, and why not get the best we can for our cash flow!

Now, as of mid-2002, to say that auto leasing is flat is an understatement, though "tanked"²³⁴ may exaggerate the decline.²³⁵ A number of les-

industry support included insistence on repeal of an existing Connecticut law that would have (as of July 2002) required disclosure of a "lease rate," anathema to the industry.

²³⁴ This term was used by a knowledgeable leasing lawyer in a recent conversation with the author. A trade association study puts the point equally colorfully concerning auto finance originations: "The 2002 . . . study validates last year's emergent story, namely, lending was the origination prince and leasing was the origination pauper." CONSUMER BANKERS ASS'N, AUTOMOBILE FINANCE STUDY, at 1.4 (2002).

sors and financial institutions have left the auto lease markets.²³⁶ The manufacturers are vigorously promoting *sales* of new cars with subsidized (“0% APR”) financing. Perhaps some folklore is developing that leases are not all that advantageous after all.²³⁷

Part of the economic problem in the auto leasing business is self-inflicted, or at least indigenous to that market. Most vehicle leases are “closed-end”; that is, the lease projects an estimated residual value of the car at the end of the lease term, and monthly rent payments are set by reference to that residual value. Essentially, the higher the expected residual value, the less depreciation needs to be accounted for in the monthly payment stream, and the smaller—and more attractive—are the monthly payments. When the lease expires the consumer lessee may simply return the car with no further obligation, and the lessor (or current “holder” of the lease)²³⁸ bears the risk that the car’s actual residual (resale) value will match the estimated value. If the actual residual value exceeds the estimated, the lessor gets a bit of a windfall on resale of the car. Or the lessee may exercise an option to buy the goods at, or close to, the estimated residual—which is a bargain purchase for the customer.

But if the car depreciates *more* than expected, or if the residual value was set artificially high, so that the estimated residual value overstates the car’s actual value at lease end, the lessor or holder faces a dead loss. The customer has no further obligation under the lease,²³⁹ and will not want to purchase the car at an inflated residual or purchase-option price. Nor will the lessor or holder, typically selling the returned vehicle in a wholesale market, recover the full estimated residual. Some leasing industry members carry insurance against these residual losses, but substantial claims experience may make that coverage very expensive or unavailable. The glut of vehicles coming off-lease has also skewed the used-car markets with over-supply, and in circular fashion this undercuts the new car mar-

²³⁵ Vehicle leases declined in dollar value during 2001 by almost 5%, while credit sales grew by more than 8%; this is by contrast to the prior year when leasing grew 11.5% and credit sales by only 7.2%. *Id.* at 1.4, fig. 1.3 (on file with the Connecticut Law Review).

²³⁶ CONSUMER BANKERS ASS’N, AUTOMOBILE FINANCE STUDY, at V.1 (2002). From a roster of the major institutional leasing companies, respondents to the leasing portion of the study declined from thirty-five in 2000, to twenty-four in 2001, and to fifteen in 2002. *Id.* The response shrinkage is attributed to companies leaving the leasing business. *Id.*

²³⁷ *See It’s the Lease You Can Do*, CONSUMER REP., Jan. 2001, at 12-17 (containing “7 keys to unlocking thousands of dollars in savings on your next auto lease”); *see also Should You Lease Your Next Car?*, CONSUMER REP., Dec. 1997, at 30-35 (containing “[a] five-minute leasing self-defense course”).

²³⁸ The term “holder” is adopted in the U.C.L.A. to include both the original lessor and a subsequent assignee of that lessor. U.C.L.A. § 102(a)(7) (2002).

²³⁹ Of course the consumer may incur extra liability under the lease for excess wear and tear on the goods. *Id.* § 407. Even when that liability (costs of repair) is imposed, it merely returns the goods to their market-value condition which, we are assuming, is depressed.

kets as many consumers choose to buy used—previously leased—vehicles in good condition and at good prices.²⁴⁰

Just as the long term effect of the new Regulation M disclosures is uncertain, so too the cycles of strength and weakness of the consumer economy as a whole and the consumer lease markets in particular are unpredictable. No one knows whether or when motor vehicle leasing, or the leasing of other consumer goods, will rebound to greater market share. Are consumer protection laws more needed (or more enactable) when the market for a particular product is flat or constricting, as the lease markets are now? Or when the markets are booming? In both contexts there may be intense competitive pressures on lessors to push their product vigorously and in the process to push the boundaries of its legal envelope. In a perverse way it is unfortunate that there was no *casus belli* with respect to consumer leasing during the drafting of the U.C.L.A., a case law or regulatory disaster that cried out for legislative compromise and cure, or a marketing innovation so dramatic it required statutory guidance. Instead, the drafting committee saw an active if quiescent market segment for which a gap-filler consumer protection law was appropriate but could be achieved only with a careful balancing of industry and consumer interests.

E. *Policy Themes of the U.C.L.A.*

There is not a single theme or policy objective that dominates the U.C.L.A., unlike, for example, the federal C.L.A. whose focus is on disclosure. Nor does the U.C.L.A. contemplate a comprehensive restructuring of industry practices, as perhaps the U.C.C.C. attempted.²⁴¹ But there are discernable policies operative in the U.C.L.A.

1. *Alignment With Other Law*

As discussed at length above,²⁴² the U.C.L.A. is designed to fit between

²⁴⁰ One by-product of the weakened market for vehicle leases, and the residual-value shortfalls that result, is an incentive for lease holders to get their customers to terminate their leases early, preferably by leasing or buying a new car before the original lease expires. Many of the "early termination" formulas require the customer who wants out of an existing lease to pay the entire unpaid-for value of the car (less its realized value on resale). The early termination charge equates to the "unamortized adjusted capitalized cost," or the "adjusted lease balance," less the then-value of the car. This effectively shifts the depreciation risk to the consumer lessee, and explains why Regulation M requires a "health warning" disclosure about "a substantial charge if you end this lease early," possibly "several thousand dollars." Cf. *Miller v. Nissan Motor Acceptance Corp.*, No. CIV.A. 99-4953, 2000 WL 1599244, at *2-*5 (E.D. Pa. Oct. 27, 2000) (finding that because a consumer terminated a lease one month before its scheduled expiration, the early termination formula in the lease would have required a payoff of \$5,337.00, but the lessor settled for the one remaining monthly payment of \$267.00.). Early termination charges are addressed in U.C.L.A. section 405.

²⁴¹ See U.C.C.C. prefatory note (1974) (emphasizing the need for law reform with respect to the price of credit, freedom of entry, and creditor remedies).

²⁴² See *supra* Part II.C.8.

the federal C.L.A. and Article 2A of the U.C.C. and to complement and dovetail with each of them and other applicable law.

2. *Transparency*

The U.C.L.A. stresses the need for consumer lessees to have ample and clear information about the lease transaction before, during, and after lease signing. In part, this is done by incorporating the C.L.A. disclosures into the U.C.L.A., but the U.C.L.A. fills in additional information requirements throughout the life cycle of the lease.²⁴³

3. *Restraints on Unconscionable Terms and Practices*

This policy might be re-stated as conscious parallelism with retail installment sales acts on the credit side. In addition to a general "unconscionability" provision,²⁴⁴ the U.C.L.A. forbids lease terms traditionally found to be oppressive, and restrains the lessor's contractual and operational remedies within bounds of what might be called industry best practices.

4. *Non-Interference with Pricing*

Unlike much state law for credit transactions, the U.C.L.A. does not directly interfere with the industry's range of options for determining the price and payment structure of consumer leases. To be sure, some of the limitations in the U.C.L.A. will inhibit certain revenue sources for lessors,²⁴⁵ and affect certain risk allocations in the consumer's favor.²⁴⁶ But on the basic formulas for calculating capitalized cost, internal rates of return, payment flows, and liquidated damages, the industry retains its freedom of contract.

5. *Protecting the Lessee's Investment in the Lease*

This might also be rephrased as protecting consumer lessees from surprise losses or liabilities. Although a lessee does not build "equity" or ownership rights in the leased goods, lessees ought not be exposed unduly to risks of financial exposure or loss of bargain that are difficult to anticipate or calculate. Examples of this policy can be seen in the rules on spot delivery,²⁴⁷ preservation of claims and defenses,²⁴⁸ cure of default,²⁴⁹ and

²⁴³ See U.C.L.A. § 202 (pre-lease availability of forms); *id.* § 204 (insurance disclosures); *id.* § 206 (information during period of lease).

²⁴⁴ *Id.* § 110.

²⁴⁵ *E.g., id.* § 401 (banning imposition of "gap" liability on consumer leases).

²⁴⁶ *E.g., id.* § 405(b) (capping early termination liability).

²⁴⁷ See *id.* § 301(b).

²⁴⁸ See *id.* § 305(b).

²⁴⁹ See *id.* § 402.

liability for excess wear and use.²⁵⁰

6. *Balanced Private and Public Enforcement*

The U.C.L.A. permits individual consumers to vindicate their rights under the Act through private actions for actual and statutory damages,²⁵¹ and in some circumstances through class actions.²⁵² The Act also vests public enforcement authority in the state attorney general or equivalent consumer protection official.²⁵³

F. *Current Status of the U.C.L.A.*

At this writing, the U.C.L.A. has been adopted in Connecticut, with an effective date of July 1, 2003.²⁵⁴ Connecticut did make about half a dozen non-uniform amendments to the official Act; these are noted in context in the discussion below.

The Act has neither been adopted nor introduced in any other state legislature to date.

IV. SCOPE OF U.C.L.A. COVERAGE

One cannot appreciate the U.C.L.A.'s contents without understanding *when* it applies, and to *what*. It applies, simply, to a "consumer lease."²⁵⁵

A. *What Constitutes a Consumer Lease?*

The U.C.L.A. definition of "consumer lease" draws on the comparable definitions in the federal C.L.A.²⁵⁶ and U.C.C. Article 2A²⁵⁷ and is meant to harmonize with both. Summarized, the ingredients for a consumer lease are:

- a lease;
- of goods;
- for a term of more than four months;
- for a contractual obligation of no more than \$150,000;
- to a lessee who is an individual; and
- the lessee is acquiring the goods for personal, family, or household purposes.

The components are cumulative; all must exist together for the lease to be

²⁵⁰ See *id.* § 407.

²⁵¹ *Id.* § 501

²⁵² For actual damages only. *Id.* § 501(d).

²⁵³ *Id.* § 507.

²⁵⁴ CONN. U.C.L.A., 2002 Conn. Pub. Acts 02-81 (Reg. Sess.).

²⁵⁵ U.C.L.A. § 104(a) (2002). "Consumer lease" is defined in U.C.L.A. section 102(a)(2).

²⁵⁶ Regulation M, 12 C.F.R. § 213.2(e) (2002).

²⁵⁷ U.C.C. § 2A-103(1)(j) (2002).

covered, and each is fraught with some complexity.

1. *A "Lease"*

The U.C.L.A. adopts the substance-over-form approach of the U.C.C. by specifying that a lease is a "right to possession and use"—not title or any semblance of it—"for a term in return for consideration."²⁵⁸ It expressly excludes transactions that are sales or security interests;²⁵⁹ thus invoking indirectly the U.C.C. definitions for each of those terms. A "sale" is defined as "the passing of title from the seller to the buyer for a price"²⁶⁰; courts should have no greater difficulty separating sales from leases under the U.C.L.A. than under the commercial code or its antecedents. A transaction is also not a lease if it is a "security interest" as defined in the U.C.C.²⁶¹ This triggers the same economic and fact-based analysis that the U.C.C. has required for years: Will the transaction likely produce a not-insignificant residual value for the lessor?²⁶² Purported leases that exhaust the useful life of the goods, or that permit the lessee to become owner of the goods or renew the lease for the remaining life of the goods for no or nominal consideration will fall into the definition of security interest.²⁶³ These "dirty leases" are not leases for purposes of the U.C.L.A.; they will be treated as credit sales under other consumer protection laws.²⁶⁴

2. *Goods*

The U.C.L.A. applies to leases of "goods," that is "all things that are movable."²⁶⁵ This refers to tangible chattels of all sorts, most obviously excluding all forms of real property leases or rentals.²⁶⁶ The definition also excludes personal property assets that are intangibles or obligations.²⁶⁷ This may seem an obvious set of exclusions, for what consumer "leases"

²⁵⁸ U.C.L.A. § 102(a)(8).

²⁵⁹ *Id.*

²⁶⁰ U.C.C. § 2-106(1).

²⁶¹ *Id.* § 1-201(37) (revised U.C.C. Article 1, § 1-201(b)(35)).

²⁶² *Id.* In revised U.C.C. Article 1, the analytic factors are spelled out in section 1-203.

²⁶³ *Id.* § 1-203(b).

²⁶⁴ *Cf.* 12 C.F.R. § 213.2(e)(2) (2002) (noting that leases defined as credit sales are not consumer leases).

²⁶⁵ U.C.L.A. § 102(a)(5).

²⁶⁶ *See id.* The U.C.L.A. definition of goods does include "fixtures," i.e., chattels affixed temporarily to real property, such as a household furnace, stove, or built-in entertainment system.

²⁶⁷ *See id.* (goods "does not include money, documents, letters of credit, letter-of-credit rights, investment property, accounts, chattel paper, deposit accounts, general intangibles . . .").

mutual funds or bills of lading? This definitional language, however, does not expressly resolve the continuing debate over the proper treatment of computer software—"computer information"²⁶⁸—particularly when it is embedded in other goods as part of their operational systems, like the chips that control a motor vehicle's ignition, brakes, and satellite navigation system. This debate stymied the revision process for U.C.C. Articles 2 and 2A for several years, and the U.C.L.A. does not resolve it.²⁶⁹

Examples at the extremes may sharpen the issue. The automobile with computer-assisted ignition and brakes seems clearly to remain entirely "goods," and a lease of that vehicle falls under the U.C.L.A. (and probably U.C.C. Article 2A as well). By contrast, a computer program that the consumer downloads into a home computer is likely to be treated as "software" and not goods,²⁷⁰ even though the software is embedded in a tangible plastic disk. A "lease" arrangement for such software would probably not be covered by the U.C.L.A.

3. *Term More Than Four Months*

A consumer lease must entitle the lessee to use the goods for more than four months.²⁷¹ It is the period of possession and use that is critical, not the payment period. This has the effect of excluding short-term leases and rent-to-own transactions.²⁷² But it does not exclude a longer term lease merely because the lease acknowledges that the lessee may terminate early on payment of an early termination charge.²⁷³ Such a lease is still a contractual commitment, and the early termination charge is considered a form of liquidated damages for breach. Most motor vehicle leases contain such

²⁶⁸ See UNIF. COMPUTER INFO. TRANSACTIONS ACT (U.C.I.T.A.) § 102(a)(10), 7 U.L.A. 205 (2002) (defining computer information, which is the critical term for coverage under the U.C.I.T.A.); *id.* § 103(a) (stating that the U.C.I.T.A. "applies to computer information transactions").

²⁶⁹ In fact, the U.C.L.A. seems to duck the issue. See U.C.L.A. § 104 cmt. 8 (stating that "this Act does not expressly address the extent to which it applies to information contained in or part of leased goods").

²⁷⁰ U.C.C. § 9-102(a)(44) (2002). In the context of security interests, U.C.C. Article 9 tries to draw a line between "goods" and "software":

["Goods"] also includes a computer program embedded in goods and any supporting information provided in connection with a transaction relating to the program if (i) the program is associated with the goods in such a manner that it customarily is considered part of the goods, or (ii) by becoming the owner of the goods, a person acquires a right to use the program in connection with the goods. The term does not include a computer program embedded in goods that consist solely of the medium in which the program is embedded.

Id.; see also *id.* cmt. 4.a (explaining that "goods" and "software" are mutually exclusive).

²⁷¹ U.C.L.A. § 102(a)(2) cmt. 2.b.

²⁷² *Id.*

²⁷³ *Id.*

provisions, and it would be an unintended irony if mainstream auto leases were accidentally excluded by the more-than-four-months rule.

4. *Contractual Obligation of \$150,000 or Less*

The lessee must be obligated "for a total contractual obligation of \$150,000 or less."²⁷⁴ The intention here is to exclude from U.C.L.A. coverage very upscale leases that are either "non-consumer in purpose, or likely to be carefully negotiated between parties of sophistication, probably with professional advice."²⁷⁵ The phraseology tracks the Regulation M Commentary to make clear that the cap measures actual cash outlays by the lessee; it ignores the residual value or any renewal or purchase option price, presumably because these are not payment obligations of the lessee.²⁷⁶ It also excludes charges paid through the lessor to third parties, such as taxes or registration fees.²⁷⁷

There is an important interface with the C.L.A. and Regulation M here. The federal law caps its coverage at \$25,000.²⁷⁸ Virtually any lease covered by C.L.A. will be covered by the U.C.L.A. But the U.C.L.A. expands its scope to the higher dollar figure, and then imposes certain C.L.A.-derived obligations (particularly disclosure) on all leases, including those from \$25,000 up to \$150,000. The disclosure obligations will be the same, but only leases up to \$25,000 are subject to C.L.A.'s penalties.²⁷⁹

Industry observers and commentators complained that the \$150,000 figure is too high, and will sweep into the U.C.L.A. very expensive leases that do not need its protections. The Drafting Committee had considered setting no cap at all, so in a sense the \$150,000 figure is a compromise. More importantly, the \$25,000 boundary figure in the federal C.L.A. was actually set in 1968 as a part of the Truth in Lending Act to which the C.L.A. was later added.²⁸⁰ The Consumer Price Index in 2002 is more than 500% of the CPI of the late 1960s, which would raise the C.L.A. figure to about \$130,000 if adjusted for inflation.²⁸¹ It is not impossible for an auto

²⁷⁴ *Id.* § 102(a)(2)(A).

²⁷⁵ *Id.* § 102(a)(2) cmt. 2.c.

²⁷⁶ 12 C.F.R. § 213.2 cmt. 2(e)3 (2002).

²⁷⁷ *Id.*

²⁷⁸ C.L.A. § 181(1), 15 U.S.C. § 1667(1) (2000).

²⁷⁹ Another consequence is that, while there is federal court subject matter jurisdiction for actions brought under the federal C.L.A., there is no comparable federal court jurisdiction for actions involving U.C.L.A. leases over the \$25,000 federal cap.

²⁸⁰ Auto leases can easily exceed \$25,000 in "total contractual obligation," and so fall outside the C.L.A. See *Kondo v. Marietta Toyota, Inc.*, 480 S.E.2d 851, 853 (Ga. App. 1997) (noting a total obligation of \$27,246.40); *Sanders v. Gold Key Lease, Inc.*, 906 F.Supp 197, 199 (S.D.N.Y., 1995) (noting a total obligation of \$25,601.06).

²⁸¹ Based on the Consumer Price Index, \$25,000 in 1968 would equate to almost \$130,000 (\$129,533.68) as of November 2002. See Columbia Journalism Review Dollar Conversion Calculator,

lease to exceed even the \$150,000 figure. In *Addison v. Burnett*,²⁸² a dealer's sale and lease-back arrangement for a twenty-two-year old Ferrari 330 GTC Roadster called for thirty-six monthly payments of \$4,213.23, or a total obligation of \$151,676.28.

5. *To an Individual*

A consumer lease requires a "lessee," who must be an "individual," that is, a natural person.²⁸³ So a lease to a corporation or other business entity, or to any other kind of organization, falls outside U.C.L.A. coverage. The rule needs to be applied with some common sense; for example, a married couple, or a household, are not organizations. At the same time, an entity acting for an individual as trustee or other fiduciary is considered a lessee for U.C.L.A. purposes.²⁸⁴ Historically, creditors sometimes required individual debtors to incorporate to avoid application of usury laws. Courts would often disregard such sham incorporations,²⁸⁵ and could do the same under the U.C.L.A. if a lessor artificially required the lessee to incorporate before entering into a lease.²⁸⁶

6. *Personal, Family, Household Purposes*

To be a consumer lease the goods must be "intended by the lessee primarily for personal, family, or household purposes."²⁸⁷ This is the conventional rubric for distinguishing consumer transactions from those intended for business, investment, agricultural, or other purpose. It is the lessee's intent that controls, as of the consummation of the lease.²⁸⁸ Lessors may understandably want to record an indication from the consumer as to the intended purpose of the leased goods, and this is quite appropriate. The lessor cannot simply hide behind a check-box indication of business or other non-consumer purpose; the use of sham "business purpose" representations has been a problem in credit transactions in the past. A lessor may be immunized from liability for violating this Act, but only if the lessor

at <http://www.cjr.org/resources/inflater.asp> (last visited Nov. 6, 2002) (on file with the Connecticut Law Review).

²⁸² 49 Cal. Rptr. 2d 132 (Cal. Ct. App. 1996).

²⁸³ U.C.L.A. § 102(a)(9) (2002) (defining a lessee as "an individual who acquires, applies for, or is offered the right to possession and use of goods under a consumer lease").

²⁸⁴ *Id.* § 102(a)(9) cmt. 9.b.

²⁸⁵ See, e.g., *Allan v. M & S Mortgage Co.*, 359 N.W.2d 238, 244-45 (Mich. Ct. App. 1984) (noting that Michigan's consumer protection act could apply to these plaintiffs because they sought relief as individuals who had incorporated only to obtain a loan); *In re Seisay*, 49 B.R. 354, 360 (Bankr. S.D.N.Y. 1985) (holding that the debtors could assert a defense of usury because the lender made the loan to an individual for personal purposes, through a corporate borrower that served as a "paper conduit").

²⁸⁶ U.C.L.A. § 102(a)(9) cmt. 9.b.

²⁸⁷ *Id.* § 102(a)(2)(B).

²⁸⁸ *Id.* § 102 cmt. 2.c.

reasonably relies on a lessee's representation as to non-consumer purposes.²⁸⁹

7. A "Lessor"

Though not technically part of the definition of consumer lease, there must be a "lessor" as a party to a lease transaction. The U.C.L.A. definition of "lessor" is based on that in U.C.C. Article 2A, and means "a person that transfers the right to possession and use of goods under a consumer lease."²⁹⁰ Two aspects of this definition are notable. First, unlike the definition of lessor in the federal C.L.A., the U.C.L.A. does not include persons who merely "offer" or "arrange" consumer leases.²⁹¹ This broader definition was used in the federal law to parallel the then-equally broad definition of "creditor" in the T.I.L.A.²⁹² The T.I.L.A. definition has since been narrowed to include only the designated payee of the obligation,²⁹³ but no comparable adjustment was made to the C.L.A. The significance of this in the federal law is primarily that there may be multiple "lessors" in a single transaction, each responsible for the C.L.A. disclosures and liable for violations. In part to avoid ambiguity about who "offers" or "arranges" a lease,²⁹⁴ the U.C.L.A. focuses instead on the single entity that actually transfers the leasehold interest. That person must comply with the Act, not agents, brokers, or other intermediaries.

Another distinction from the C.L.A. is that the U.C.L.A. definition of lessor is not, by its terms, limited to professional lessors, i.e., merchants who regularly lease consumer goods. This qualification is picked up in the U.C.L.A. exclusions, discussed below.²⁹⁵ Nor does the U.C.L.A. exempt lessors that are public utilities;²⁹⁶ the phone or gas company that leases goods to customers may be covered (unless the transactions are excludable for other reasons).²⁹⁷

²⁸⁹ *Id.* § 502. It is actually a two-step test: The holder must have a "reasonable belief" that it is not a consumer lease based on "reasonable reliance" on the lessee's representation. *Id.*

²⁹⁰ *Id.* § 102(a)(10).

²⁹¹ C.L.A. § 181(3), 15 U.S.C. § 1667(3) (2000).

²⁹² See T.I.L.A., Pub. L. No. 90-321, 82 Stat. 146, 177, § 103(f) (1968).

²⁹³ T.I.L.A., 15 U.S.C. § 1602(f)(2).

²⁹⁴ This can be a difficult factual issue. See *Dwyer v. Barco Auto Leasing Corp.*, 903 F. Supp. 205, 207 (D. Mass. 1995) (noting that the plaintiffs and the defendants "entertained radically different perceptions of the essential nature of the transactions into which they had entered").

²⁹⁵ See discussion *infra* Part IV.B.1-2.

²⁹⁶ The federal C.L.A. likewise has no exemption for public utility lessors. The T.I.L.A., on the other hand, exempts public utility credit for services, but not for the financing of durable goods or home improvements. 12 C.F.R. § 226.3(c) (2002).

²⁹⁷ For example, if the lease is terminable at the end of any weekly or monthly payment period, it is not an obligation for more than four months (or the equipment rental may be considered incidental to the sale of services).

If all of the above elements are present, the transaction is a consumer lease under the U.C.L.A. But that is not the end of questions about U.C.L.A. coverage.

B. *The Edges of Coverage*

Even with the detailed definition of “consumer lease” just described, transactions do not always fall neatly within or outside it. The Act envisions some circumstances where its scope is narrowed a bit, and others where coverage may expand beyond the literal boundaries.

1. *More than Five Leases in a Year*

Like the federal C.L.A., the U.C.L.A. is meant to apply to leases only where the lessor is a merchant, an entity that regularly conducts a leasing business in the marketplace. In the C.L.A. this limitation is handled within the definition of lessor, by limiting that term to a person who is “regularly” engaged in consumer leasing.²⁹⁸ Regulation M refines this to a bright-line test: A person leases *regularly* if it made more than five leases in the prior calendar year, or after the fifth lease in the current year.²⁹⁹ If I rent my neighbor’s lawn mower for the summer, U.C.C. Article 2A will apply to the transaction, but neither the federal C.L.A. nor the U.C.L.A. will cover it.

The U.C.L.A. treats this as an explicit limitation on coverage; the Act does not apply to what otherwise would be a consumer lease unless the lessor has made the requisite five leases in the prior or current year.³⁰⁰ In other words, a leasing dealer who has been in business for some time is always covered because it will have made more than five leases in the preceding year. A start-up leasing company has five “free” transactions in the start-up year but then is covered for the rest of that year and all of the next. This “five-transactions” rule may also exclude truly occasional leases even when made by a merchant who primarily sells or services goods.³⁰¹

²⁹⁸ C.L.A. § 181(3), 15 U.S.C. § 1667(3).

²⁹⁹ 12 C.F.R. § 213.2(h).

³⁰⁰ U.C.L.A. § 104(b) (2002).

³⁰¹ See *id.* For example, a piano dealer may sell almost all of its piano inventory, but occasionally arrange a lease for a customer under special circumstances. Until the dealer makes its sixth lease in a calendar year, the U.C.L.A. does not apply. See *id.* § 104 cmt. 2. The U.C.L.A. differs from U.C.C. Article 2A in this regard. See U.C.C. § 2A-103(1)(e) (2002) (explaining that a consumer lease is one involving a lessor who is “regularly engaged in the business of leasing or selling . . .”) (emphasis added). Under this U.C.C. definition, the piano dealer’s first lease would be treated as a consumer lease for purposes of Article 2A.

2. Other Explicit Exclusions

The U.C.L.A. also excludes from its coverage several other types of transactions, including safe-deposit box rentals,³⁰² and home furnishings incidental to a lease of real property (the furnished home or apartment situation).³⁰³ Both of these track exclusions in Regulation M or its Commentary.³⁰⁴ So also does an exclusion for a lease of "goods incidental to a contract for the sale of goods or services."³⁰⁵ This recognizes the possibility of hybrid transactions that combine elements of lease and sale, an issue that courts have addressed under U.C.C. Article 2 usually by applying a "predominance" or "gravamen" test to gauge whether the transaction as a whole should be considered a sale of goods within Article 2, or a lease (or a sale of services) governed by other law.³⁰⁶ The Comments to U.C.L.A. § 104 give examples and elaborate on how these tests should be applied.³⁰⁷

The U.C.L.A. also addresses directly several "hybrid" issues that courts (or enforcement agencies) might otherwise have to test in a vacuum. One is the transaction that is clearly a consumer lease, but in which the lessee *buys* certain goods or services as an incident to that lease. A service contract or a trailer hitch purchased as part of a car lease are given as examples.³⁰⁸ If a consumer purchased the trailer hitch separately on credit, that would be a credit sale subject to disclosure or other regulation under a retail installment sales act. Or the separate purchase of insurance might be subject to rules on insurance premium financing.³⁰⁹ Under the Act³¹⁰ these items may be swept into the lease, usually as part of the capitalized cost or

³⁰² U.C.L.A. § 104(c)(1).

³⁰³ See *id.* § 104(c)(2).

³⁰⁴ 12 C.F.R. § 213.2(2)(e) cmt. 8 (exempting safe deposit boxes from consumer leases); *id.* § 213.2(e)(3) (excluding, with certain restrictions, personal property that "is incidental to the lease of real property").

³⁰⁵ U.C.L.A. § 104(c)(3). See 12 C.F.R. § 213.2(2)(e) cmt. 7 (listing "incidental leases of personal property").

³⁰⁶ See, e.g., *Tivoli Enter., Inc. v. Brunswick Bowling & Billiards Corp.*, 646 N.E.2d 943, 947-48 (Ill. 1995) (applying the predominant purpose test); *Anthony Pools v. Sheehan*, 455 A.2d 434, 440-41 (Md. 1983) (holding that the mechanical predominant purpose test is prohibited by the state statute and applying the gravamen test instead); *In re Trailer & Plumbing Supplies*, 578 A.2d 343, 345 (N.H. 1990) (considering both the predominant purpose test and the gravamen test, and determining that "the gravamen of the action analysis is inappropriate"); *Pass v. Shelby Aviation, Inc.*, No. W1999-00018-COA-R9-CV, 2000 LEXIS 247, at *9 (Tenn. App. Apr. 13, 2000) (recounting the choice between the "gravamen" and the "predominant factor" tests and noting that Tennessee adopted the predominant factor approach).

³⁰⁷ U.C.L.A. § 104 cmt. 5 & cmt. 7.

³⁰⁸ *Id.* § 104 cmt. 6.

³⁰⁹ *Id.* A state enacting the U.C.L.A. should insert into section 104(d) references to the specific other state laws being preempted or displaced.

³¹⁰ *Id.* § 104(d).

periodic payment amount, and are no longer subject to other state laws that would apply to the incidental items if sold or financed separately. The objective of the U.C.L.A. rule is to permit what is in fact a single transaction to be written and disclosed as such, without redundant paper work for its component parts.

Similarly, when a consumer enters a lease, the consumer may owe sums for governmental fees or taxes related to the lease, or may carry over a debit balance from a prior transaction, as by making an "under water" or "upside down" trade-in.³¹¹ Technically, the lessor may be viewed as making a loan to the consumer for those amounts. Again, the Act allows those obligations to be swept into the lease without being subject to otherwise applicable small loan or consumer lending laws.³¹²

The intention of these "merger" provisions (in which certain non-lease charges merge in the lease) is to avoid redundant paper work and disclosure. It is not meant to deprive consumers of the substantive protections they would get if the hitch or insurance were sold separately, or if a lender made a direct loan to the consumer to pay off the prior credit balance. So sales warranties should continue to apply to the hitch, and insurance coverage and premium limitations to the insurance.³¹³ In identifying which state laws are to be displaced under U.C.L.A. section 104(d) and (e), a state may find it necessary to refer to *parts* of certain acts, but not all of them. For instance, if the state has a comprehensive credit code (like the U.C.C.C.), it might displace the provisions on disclosure and collection rights, but leave provisions on insurance pricing in place.

3. *Re-characterization*

The consumer protections of the U.C.L.A. would be lost if the parties could contract out of its coverage, and, not surprisingly, the Act bars an agreement that a consumer lease "is governed by other law in lieu of this Act."³¹⁴ On the other hand, the Act invites parties to a lease that is not a consumer lease to contract for coverage by the U.C.L.A.³¹⁵ As the Com-

³¹¹ That is, the consumer owes more on the car than it is worth. Either the consumer must pay off that prior loan balance separately, or the unpaid balance may be rolled into the lease as part of the capitalized cost.

³¹² U.C.L.A. § 104(e). Again, an enacting state is to insert references to the specific credit laws being displaced.

³¹³ *Id.* § 104 cmt. 6.

³¹⁴ *Id.* § 105(c). A particular concern in the drafting process was that lessors of computers and related software, or lessors of other "smart goods," might contract for coverage by "computer law," such as the Uniform Computer Information Transactions Act.

³¹⁵ *See id.* § 105(b).

ment notes, this "permits lessors to establish a safe-harbor legal framework for leases at the margins of [U.C.L.A.] coverage."³¹⁶

Further, the Act engages in some wishful thinking, or perhaps just states the obvious, by providing that a consumer lease "may not be deemed a credit sale, loan, or security interest to make the transaction subject to coverage by other law in lieu of this Act."³¹⁷ The intent is to discourage courts or enforcement agencies from taking a hind-sight view of a consumer lease transaction and deciding that it more resembles a sale or security interest than a true lease.³¹⁸ Of course, whether the transaction was properly characterized as a lease in the first place is always subject to challenge.

4. *Choice of Law*

The applicability of the U.C.L.A. to a given lease transaction can be affected by the parties' contractual choice of governing law. There is a risk that the pre-printed lease contract may specify coverage by the law of a jurisdiction distant from the consumer's home territory, having little relationship to the transaction and affording little consumer protection. To prevent that kind of manipulation, the Act invalidates a choice of law provision unless it is the law of a jurisdiction that suits the transaction in one of several ways.³¹⁹ Thus a stipulation for the law of the consumer's actual or anticipated principal residence is permissible.³²⁰ So too is the selection of the law of the jurisdiction where the leased goods will be *used*;³²¹ the drafters give as examples a snowmobile or boat used at a vacation home.³²²

To this point, the U.C.L.A. rule on choice of law for consumer leases is

³¹⁶ *Id.* § 105 cmt 3. Literally this would seem to permit rent-to-own transactions to be brought under the U.C.L.A. if the contract so provides. But it seems doubtful a rent-to-own merchant would prefer the U.C.L.A. to existing law on that product.

³¹⁷ *Id.* § 105(a).

³¹⁸ See, e.g., *Granite Auto Leasing v. Jeff-Mar Bus Leasing Corp.*, 353 N.Y.S.2d 217, 220 (N.Y. Sup. Ct. 1974) (noting different factors that indicate the contract at issue was for the sale of a boat, despite the labels of lessee and lessor). In several more recent cases courts have re-characterized rent-to-own transactions as credit sales. See *Miller v. Colortyme, Inc.*, 504 N.W.2d 258 (Minn. App. 1993) (noting that the rent-to own contracts "clearly constitute a 'sale of goods'" but in the instant case were not considered consumer credit sales because the customers prepaid); *Rent-A-Center v. Hall*, 510 N.W.2d 789, 795 (Wis. App. 1994) (concluding that an agreement for the rental of appliances was a "consumer credit sale").

³¹⁹ U.C.L.A. § 108.

³²⁰ *Id.* § 108(a)(1)-(2). The latter subsection deals with a situation where the consumer plans to relocate to a new residence within thirty days after entering into the lease. The Comments indicate that while a consumer may have more than one residence, only one of them can be the "principal" residence. *Id.* cmt. 2.

³²¹ *Id.* § 108(a)(3).

³²² *Id.* cmt. 1. The emphasis is on where the goods are used, not stored. Thus the law of the ski-cottage state could be chosen even though the snowmobile is kept in the consumer's garage at home for eight months of the year.

identical to that in U.C.C. Article 2A.³²³ But the U.C.L.A. goes on to bless another limited option—the lease contract may choose the law of the jurisdiction where the consumer *receives* the goods.³²⁴ This deals with the common situation where a consumer living in a multi-state metropolitan area shops across state lines—a Maryland resident leases from a dealer in Washington, D.C., for example. The transaction is negotiated at the dealership in Washington, the paperwork is executed there, and the consumer takes delivery of the goods there. Subject to a limitation to be mentioned, a contractual provision applying Washington, D.C. law to the lease is valid. The justification is two-fold. First, as a practical matter, it may be difficult for the D.C. dealer to maintain forms (and software) that satisfy the laws of all the jurisdictions in which its customers may reside; nor is it feasible to customize each lease contract depending on where the customer lives.³²⁵ Second, a consumer who has chosen to shop and take delivery of leased goods in D.C. is not likely to be surprised by the choice of D.C. law for a lease consummated there; there is no inherent unfairness or manipulation in applying the law of the lessor's location.

The limitation on this fourth choice-of-law option has to do with enforcement and collection activities. In the example above, assume Maryland has enacted the U.C.L.A. but Washington, D.C. has not. If the Maryland lessee defaults and the D.C. lessor wants to enforce the lease in Maryland, the lessor must comply with Maryland law (the U.C.L.A.) with respect to that enforcement action.³²⁶ For instance, the lessor must provide a right to cure, is subject to limitations on repossession, early termination liability, excess wear and use limitations, and cannot enforce lease provisions prohibited in the U.C.L.A. (such as a confession of judgment clause).³²⁷ In enforcing the lease in Maryland, the D.C. lessor is not subject to retrospective challenge to disclosures or other lease provisions that were valid in D.C. at the time the lease was consummated there. For example, the lease document might not satisfy the U.C.L.A. disclosure rules, or might impose gap liability on the lessee. These aspects of the transaction cannot be undone at the collection stage, and are judged under D.C. law, where the consumer "received" the leased goods.

Lastly on choice of law, note that the U.C.L.A. does not attempt to state its "territorial applicability," nor does it require or dictate a choice of law provision in the lease. Thus, absent a valid choice of law clause in the lease, a forum court in a U.C.L.A. state will have to determine applicable

³²³ See U.C.C. § 2A-106(1) (2002).

³²⁴ U.C.L.A. § 108(a)(4).

³²⁵ Neither of these problems arises, of course, if the U.C.L.A. is enacted uniformly! Choice of law becomes a non-issue, except to the extent there may be non-uniform amendments in some states.

³²⁶ U.C.L.A. § 108(b).

³²⁷ *Id.* § 108(b)(1) (referencing the prohibitions in section 302).

law under the common law of conflict of laws, typically the law of the jurisdiction where the contract was made or was to be performed, or the jurisdiction with the most significant relationship to the transaction.³²⁸

5. "Supplemental Provisions and Principles"

A final aspect of the scope of the U.C.L.A. is its relationship to other law in the enacting state, an issue touched on above.³²⁹ The Act makes clear that it is not comprehensive treatment of consumer leases, but "is supplemented by other applicable statutory provisions and by general principles of law and equity . . ."³³⁰ This is a familiar notion from the U.C.C.; it confirms that courts may look to other law of the state, both statutory and case law, to augment the black letter of the U.C.L.A. The policy is one of *supplementation*, however, and not *override*. Thus the same U.C.L.A. provision goes on to say that other statutory provisions or common law principles do not apply to consumer leases if "displaced by or inconsistent with the provisions of this Act."³³¹ The question is how does this preemptive mechanism work? How do you know when other law is "displaced by" or "inconsistent with" the U.C.L.A.?

The U.C.L.A. Comments give some guidance,³³² but perhaps not enough, and the courts will eventually have to fashion answers case by case. There is little difficulty when the U.C.L.A. is merely *adding* consumer protection rules to transactions that would otherwise be unregulated—for example when the U.C.L.A. prohibits "gap" liability, or preserves the lessee's claims and defenses, or requires additional disclosures. And the "displaced or inconsistent" standard seems to work adequately when the U.C.L.A. explicitly *changes* what would otherwise be the controlling law.³³³ But the U.C.L.A. also establishes a number of protective, or "safe harbor," rules for lessors: "if you do it this way, it is legal."³³⁴ What

³²⁸ See generally RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS ch. 7 (4th ed. 2001).

³²⁹ See *supra* Part IV.B.3-4; see also U.C.C. § 2A-106 (2002); U.C.L.A. § 108a.

³³⁰ U.C.L.A. § 106.

³³¹ *Id.*

³³² *Id.* cmts. 1-2.

³³³ *Id.* cmt 2. This Comment explains:

For example, Section 305(b) [Preservation of Lessee's Claims and Defenses] would **displace** any common law or statutory right of a holder to invoke a waiver of defense clause, such as under U.C.C. § 9-404(a). By contrast, the statutory limits on late charges under Section 304 of this Act may have no direct counterpart in other law of this state (other than the general law of contracts). In a given case this may lead to **inconsistent** answers on permissible late charges. If so, the answer dictated by this Act controls.

Id. (emphasis in original).

³³⁴ See, e.g., U.C.L.A. § 303(d) (stating that a lessor need not credit the lessee with interest earnings on a security deposit); *id.* §301(b)(2) (explaining that a lessor may impose a mileage charge for a

happens if terms or practices authorized by the U.C.L.A. are arguably challengeable under other law in the state? Does the U.C.L.A. in a sense "pre-empt" that other state law?

For comparison, consider the preemption rule in the federal C.L.A. with respect to that act's relationship to state law. State laws are *not* preempted "except to the extent that those laws are inconsistent with any provision of [the C.L.A.], and then only to the extent of the inconsistency."³³⁵ Moreover, the Federal Reserve Board "may not determine that any State law is inconsistent with any provision of [the C.L.A.] if the Board determines that such state law gives greater protection and benefit to the consumer."³³⁶ This is clearly a policy of limited preemption and deference to more protective state law. There is no comparably explicit statement in the U.C.L.A. concerning its effect on other state laws that may be more protective. Should such a policy of deference be inferred? Should "inconsistent" be interpreted to retain other state laws that are more stringent than the U.C.L.A.?

Frankly, it seems inconsistent with the U.C.L.A. drafting history to infer that more protective laws remain applicable to consumer leases in the face of explicit authorizations in the U.C.L.A. In other words, terms or practices specifically permitted by the U.C.L.A. ought not be subject to challenge under other state laws of general applicability.³³⁷ A contrary interpretation ignores the efforts of the drafters to maintain a balance between consumer and industry interests, and to supply fairly bright-line guidance to lessors. Under such an interpretation, the Act would become a consumer protection floor, but there would be no ceiling on potential compliance requirements and exposure for lessors.³³⁸

Connecticut has made a non-uniform amendment to the U.C.L.A. "supplemental law" provision that seems to take something of the latter approach. It adds to U.C.L.A. section 106 the following sentence: "Nothing in this Act shall be construed to limit or restrict in any way any rights or remedies which may be available to a lessee or person under any other statutory provisions or under general principles of law and equity."³³⁹

spot-delivered car if the lessee's application is not approved); *id.* § 108(a)(4) (stating that a lease may choose to be governed by the law of the jurisdiction where the goods are delivered to the lessee).

³³⁵ C.L.A. § 186(a), 15 U.S.C. § 1667e(a) (2000).

³³⁶ *Id.*

³³⁷ This reading also seems compelled by basic canons of statutory interpretation that make more recently enacted and more specific statutes controlling over earlier and more general ones.

³³⁸ The issue here is whether terms or practices blessed in the U.C.L.A. can be outlawed or qualified by other state law. See U.C.L.A. § 506(b) (permitting lessor *misconduct* to be challenged as a violation of other (non-U.C.L.A.) law as well). And the U.C.L.A. in no way precludes a consumer lessee from separately proving fraud, misrepresentation or unconscionability despite the lessor's technical compliance with the Act, such as where a sales person orally misstates critical facts or covers up disclosures.

³³⁹ CONN. U.C.L.A. § 6, 2002 Conn. Pub. Acts 02-81 (Reg. Sess.).

Neither the legislative notes accompanying the Connecticut bill, nor the sponsoring Representative's remarks on the Connecticut House floor, elaborate on this amendment,³⁴⁰ so there may be some uncertainty as to exactly what the language intends. Literally it seems to say to lessees, "get what protection you can from this Act, but if you can find a different and more favorable rule or a stronger remedy elsewhere in state statutory or common law you can invoke that law instead."³⁴¹ If this is the legislative choice in Connecticut, or elsewhere, so be it. But it seems to give lessees the best of both worlds, and to deprive the uniform Act of some of its stability and balance.³⁴² A better interpretation might be that this non-uniform addition to the Connecticut act merely confirms that *violations* of the U.C.L.A. remain subject to other law as well.

V. INFORMATION FLOW; DISCLOSURES

The U.C.L.A. accepts the premise that consumers can often protect themselves from bad bargains or over-reaching, and that much potential marketplace mischief can be avoided, if consumers have adequate, accurate information about the transactions they consider. This philosophy is particularly relevant to leases, where consumers have less experience, there is less reliable folk-lore, the terminology is opaque, and the lease terms are often intricate. As counterpoint, disclosure can be ineffective if it is overdone—the "information overload" phenomenon.³⁴³ And, when auto leases are approaching two feet in length, fully printed front and back, there are practical limits on how much information can be shoe-horned into lease documentation.

The U.C.L.A. primarily relies on the federal C.L.A. and Regulation M for lease advertising and transactional disclosure rules, but adds some disclosure, or "information," requirements of its own.

³⁴⁰ OFFICE OF LEGIS. RES., BILL ANALYSIS ON HB 5248, *An Act Concerning the Uniform Consumer Leases Act*, at <http://www.cga.state.ct.us/2002/olrdata/gl/ba/2002HB-5248-R000083-BA.htm> (last visited Nov. 6, 2002) (on file with the Connecticut Law Review); Remarks of Representative John W. Fox, Connecticut House of Representatives (April 26, 2002), at <http://prdbasis.cga.state.ct.us/BASIS/TSAMDHP /LIN1/AMD/MSDF> (last visited Nov. 6, 2002) (on file with the Connecticut Law Review).

³⁴¹ *E.g.*, U.C.L.A. § 304(a) (permitting a late charge up to \$10 after a 10-day delinquency). If a state law generally requires a 15-day grace period, or limits a late charge to \$5, can the consumer lessee claim that a \$10/ten-day late charge is unlawful despite U.C.L.A. approval of it? It seems neither logical nor appropriate to undermine the U.C.L.A. in this fashion. If the state wants to restrict late charges, or any other aspect of a consumer lease, in the face of U.C.L.A. authorizations, the right technique would be to amend the U.C.L.A. itself.

³⁴² A version of this issue has been fought out under the federal T.I.L.A., with several courts holding that if the credit cost disclosures satisfy T.I.L.A., they cannot simultaneously violate a state consumer fraud law. *See Jackson v. S. Holland Dodge*, 755 N.E.2d 462, 470 (Ill. 2001).

³⁴³ *Cf.* Ralph J. Rohner, *Truth in Lending "Simplified": Simplified?*, 56 N.Y.U. L. REV. 999, 1006-07 (1981).

A. Advertising and Pre-Lease Availability of Information

For lease advertising, the U.C.L.A. starts³⁴⁴ by adopting by reference the C.L.A. requirements.³⁴⁵ Since the U.C.L.A. covers leases up to \$150,000, this means that advertisements for even the most upscale leases are covered, and must meet the federal standards.³⁴⁶ Lest leases not be adequately covered by a general consumer fraud or false advertising law in the enacting state, the U.C.L.A. then adds a broad prohibition against any "false, deceptive, or misleading advertisement,"³⁴⁷ suggesting this should be interpreted consistently with the law on advertising practices developed by the Federal Trade Commission and comparable state law.³⁴⁸ As in the C.L.A., these advertising rules do not apply to the advertising media—newspapers, radio-TV stations—that merely carry leasing ads.³⁴⁹

In section 202 the U.C.L.A. introduces a "disclosure" requirement that is somewhat novel and experimental.³⁵⁰ It requires that a lessor furnish a prospective customer, on request, a blank copy of the lease. This is to occur pre-consummation, that is, while the customer is still shopping, or perhaps is simply curious. The thought is that consumers may benefit if they have a chance, at their leisure, to read through the often lengthy lease form, appreciate the standard pre-printed terms, and perhaps ask questions about those terms or the transactional details that would be filled in later.³⁵¹ The challenge to the drafters was to make this kind of industry "best practice" a legal obligation without transforming it into a compliance nightmare. So the provision is very carefully hedged. The merchant must supply the form

³⁴⁴ U.C.L.A. § 201(b).

³⁴⁵ 12 C.F.R. § 213.7 (2002). This fairly lengthy provision bans bait-and-switch advertising, sets "prominence" standards for key terms (amount due at lease signing, lease rate), and then provides that certain terms, if advertised, trigger the obligation to include other specified terms in the ad. There are also special format rules to accommodate the limitations of merchandise-tag and TV-radio advertising. These rules are analyzed in NAT'L CONSUMER L. CTR., TRUTH IN LENDING § 9.4 (4th ed. 1999 & Supp. 2001).

³⁴⁶ Unlike its sibling T.I.L.A., the C.L.A. permits private remedies for violations of the advertising rules if the claimant proves actual damages. 15 U.S.C. § 1667d(b) (2000). U.C.L.A. section 501(b) permits recovery of actual damages for any violation of the Act, which would include the advertising rules borrowed from the C.L.A..

³⁴⁷ U.C.L.A. § 201(c).

³⁴⁸ *Id.* § 201 cmt. 2. Here, too, a consumer might recover provable actual damages under U.C.L.A. section 501.

³⁴⁹ *Id.* § 201(d). The Comment to this section points out that this would not protect "a lessor that maintains an advertising web site or otherwise posts advertising messages over the Internet system." *Id.* § 201 cmt. 3.

³⁵⁰ Similar provisions are enacted in New York, N.Y. PERS. PROP. LAW § 333 (2002), and Wisconsin, WIS. STAT. § 429.201 (1998).

³⁵¹ Under the C.L.A. (and U.C.L.A.) rules for transactional disclosures, the disclosures must be given before "consummation" of the lease. 12 C.F.R. § 213.3(a)(3). Since lessor and lessee must have by then negotiated the goods to be leased and the essential lease terms, the disclosures made at closing do not really enable comparative shopping, or even careful reading.

only on request at the lessor's place of business, or "electronically"—by fax, e-mail, or web page—but only if the lessor consummates lease contracts electronically.³⁵² The form may be a "copy or reproduction," including a computer print-out.³⁵³ Where a lessor uses multiple forms, it need only provide one that "is pertinent to the type of lease about which the individual has inquired."³⁵⁴ The first such form is free, but the lessor may charge for additional copies. The Drafting Committee was optimistic that this technique will prove to be a fruitful way of enhancing consumer understanding of lease transactions.

B. *Information at Lease Closing*

1. *Transactional Disclosures*

For basic transactional disclosures, the U.C.L.A.³⁵⁵ adopts the federal disclosure rules from the C.L.A. and Regulation M for all leases covered by the U.C.L.A., i.e., up to \$150,000 even though the federal law is capped at \$25,000. The disclosures also must follow the timing and format requirements of the federal law. That is, the disclosures must be made "clearly and conspicuously," "in a form the customer may keep," and be given "prior to the consummation of a consumer lease."³⁵⁶ The contents of the disclosures are summarized above.³⁵⁷ The disclosures may be made in a separate statement, or within the lease itself;³⁵⁸ certain key disclosures must be segregated from other information.³⁵⁹

³⁵² If a lessor actually closes lease deals electronically, as through an interactive web page, it must be prepared to furnish electronic copies of the lease form on that web page, *or* it may respond to a web-page request by mailing the prospective customer a hard copy.

³⁵³ For example, a dealer might provide on-site computer access to a web page that permits display of various lease forms. So long as the consumer can scan the forms, and print and retain a copy, that should be sufficient.

³⁵⁴ U.C.L.A. § 202(c).

³⁵⁵ *Id.* § 203(a)-(c) (including renegotiations and extensions).

³⁵⁶ 12 C.F.R. § 213.3(a). These latter two phrases mimic language in T.I.L.A. that has spawned a raft of litigation and a Commentary clarification on the question whether the merchant may present the disclosures in the credit contract itself, allow the customer to see and read it, but then take the contract back for processing and furnish the customer a copy later. The leading cases are seemingly contradictory holdings from the same federal circuit. *Polk v. Crown Auto, Inc.*, 221 F.3d 691 (4th Cir. 2000) (holding that the seller must provide the buyer with a separate, retainable written disclosure, in the proper form before consummation of the transaction); *Gavin v. Koons Buick Pontiac GMC, Inc.*, No. 01-1436, 2002 WL 46759, at *3 (4th Cir. Jan. 14, 2002) (upholding summary judgment for the dealer where buyer was presented with written disclosures in the proper form in the credit contract, prior to the finalization of the contract). This prompted a clarification in the Regulation Z Commentary. 67 Fed. Reg. 16,980, 16,981-82 (Apr. 9, 2002), adding new Comment ¶ 226.17(b)(3) (clarifying that "creditors satisfy T.I.L.A. by giving a copy of the document containing the disclosures to the customer to read and sign" prior to consummation). Hopefully, this T.I.L.A. guidance is transferable to leases.

³⁵⁷ See *supra* note 51 and accompanying text.

³⁵⁸ 12 C.F.R. § 213.3(a)(1).

³⁵⁹ *Id.* § 213.3(a)(2).

In the federal law, when "consummation" occurs is left to state law,³⁶⁰ and the U.C.L.A. explains that it occurs "when the lessee signs a record evidencing the lessee's contractual obligation under the lease."³⁶¹ "Prior to consummation" therefore means any measure of time—even a nano-second—before the consumer signs. Since the disclosures must be made "prior to consummation," it might seem that a lessor would not violate the Act by failing to give the correct disclosures if a lease was never consummated.³⁶² This result does not follow under the U.C.L.A., which goes on to note that "a lessee may consummate a consumer lease even if it is subject to subsequent credit or other approval by the lessor or an assignee of the lessor."³⁶³ This deals with the "spot delivery" situation where a consumer signs the lease papers (and takes delivery of the goods) but the terms of the deal must be approved later by the lessor or financier. The consumer is committed when he signs, and is entitled to the disclosures at that point, even though there is a "condition subsequent" on the lessor's side.

At the cost of lengthening even further what are already lengthy lease forms, the U.C.L.A. adds some additional disclosure ingredients to those required by the C.L.A.: a statement and warning notice that the document is a lease,³⁶⁴ identification of the lessor's place of business and the lessee's residence,³⁶⁵ identification of any trade-in,³⁶⁶ and an itemization of the gross capitalized cost.³⁶⁷ The recording of these extra items in the lease can be important when disputes arise down the road, especially as to components of the capitalized cost. Comparable disclosures are called for under most retail installment sales acts. Further, except perhaps for the "idiot warning" that the document is a lease, this information is often included in the lease anyhow, and hopefully will not require unduly expensive redesign of forms.³⁶⁸

³⁶⁰ *Id.* §213, Supp. 1 ¶ 3(a)(3)-1.

³⁶¹ U.C.L.A. § 103(a).

³⁶² The theory is that, without consummation, there was never a time before which the disclosures were due. T.I.L.A. interpretations are generally to this effect. See RALPH J. ROHNER & FRED H. MILLER, *TRUTH IN LENDING* 261-62 (Amer. Bar Ass'n 2000). But see *Dauti v. Hartford Auto Plaza, Ltd.*, No. CIVA3-99-CV-994 (D. Conn. Feb. 16, 2001) (holding that disclosures given at the point of sale, if inaccurate, would violate the federal CLA even though no binding lease was ever created.) The court later determined that the defendants' disclosures in fact complied with the federal law. *Dauti v. Hartford Auto Plaza, Ltd.*, 213 F. Supp. 2d 116 (D. Conn. 2002).

³⁶³ U.C.L.A. § 103(a).

³⁶⁴ *Id.* § 203 (c)(2).

³⁶⁵ *Id.* § 203 (c)(3).

³⁶⁶ *Id.* § 203 (c)(4).

³⁶⁷ *Id.* § 203 (c)(5).

³⁶⁸ In the 1996 revision of Regulation M, the Federal Reserve Board compromised on itemization of the capitalized cost. The regulation requires the itemization only on the customer's request. Instead of disclosing that option and then preparing itemizations separately when requested, most lessors have preferred to put the itemization in the lease in the first place. See 12 C.F.R. 213, Supp. 1 ¶ 4(f)(1)-2 (2002). For these lessors, the U.C.L.A. adds no new burden.

There is also the traditional prohibition against having the customer sign forms with blank spaces to be filled in later.³⁶⁹ This otherwise could be an obvious invitation to fraud.

2. *Copies of Transaction Records*

The U.C.L.A. requires that the lessee be given a "written" copy of the lease and a copy of "all other records that the lessee has signed in connection with the transaction."³⁷⁰ This has two implications. First, this is one of only two places in the Act where a *writing* is required; otherwise the U.C.L.A. uses the medium-neutral term "record" to accommodate electronic documentation. The effect here, by virtue of the recent federal E-SIGN law, is that the lessor will need to get the consumer's affirmative permission to substitute an electronic record for a traditional paper writing.³⁷¹ Secondly, and contrary to some current practice, this provision will assure that the consumer has copies of all signed documents that may reflect some part of the deal or the consumer's commitment to it. This would include applications, work-sheets, purchase orders, spot-delivery agreements, and the like—if signed by the consumer. To recognize the practicalities of gathering and copying these documents there is some flex in how "promptly" they must be provided.³⁷²

Failure to give any of these point-of-closing disclosures is a violation of the U.C.L.A., and may give the consumer a remedy under Part 5 of the Act, but it does not vitiate the contract or give rise to a right of rescission. Whether the lease represents a binding contract is determined under the usual law of contracts, including U.C.C. Article 2A.³⁷³

3. *Insurance Disclosures*

The federal C.L.A. and Regulation M already require a "brief identification" of any insurance included in the lease (and its cost if provided by or through the lessor), and the U.C.L.A. amplifies a bit on what information the lessor must give to the lessee.³⁷⁴

- For required casualty or liability insurance, the consumer must be told he can acquire it from an insurer of the lessee's choice;³⁷⁵

³⁶⁹ U.C.L.A. § 203(d). An exception is made for future delivery situations where certain data are not known until after the lessee has signed. *Id.*

³⁷⁰ *Id.* § 203(e).

³⁷¹ See discussion of E-SIGN *infra* Part VI.E.

³⁷² U.C.L.A. § 203 cmt. 5.

³⁷³ *Id.* § 203 cmt. 4.

³⁷⁴ *Id.* § 204. Each of these insurance disclosures must be in a record, but not necessarily in the lease itself. *Id.* § 204(b).

³⁷⁵ *Id.* § 204(a).

- If casualty insurance is neither provided nor required—i.e., if the goods are being leased “naked”—the lessee must be told that fact;³⁷⁶
- The lessee may not be required to purchase credit insurance—insurance that pays off the obligation if the consumer dies, is disabled, or loses employment—and credit insurance may be sold to the consumer only if the lessor discloses that it is optional and the consumer signs an election to purchase it.³⁷⁷
- The lessor must furnish a copy of any policy or certificate of insurance bought through the lessor.³⁷⁸

4. *Notice to Guarantor*

A common problem in the history of consumer credit has been the plight of a co-signer or guarantor who agreed, or was coaxed, to sign onto a credit obligation to help out an un-creditworthy spouse, friend, or relative, without appreciating the nature of the potential liability being incurred. The U.C.C.C. and other state credit laws have required explicit co-signer notices for decades,³⁷⁹ and such a notice is a central part of the Federal Trade Commission’s “Credit Practices Rule.”³⁸⁰ That a comparable rule would appear in the U.C.L.A. is hardly surprising.

The mechanics of the U.C.L.A. provision³⁸¹ are straightforward. Before a person signs to guarantee a lease, the lessor must give that individual a specified notice spelling out the obligation and risks the guarantor undertakes. Absent that notice (and a copy of the guaranty obligation itself), the guarantor’s obligation is not enforceable. The tricky question is who is a “guarantor” affected by this provision. The U.C.L.A. tries to draw the definition³⁸² fairly narrowly, or at least tries to avoid ambiguity that would leave lessors guessing whether one of every set of co-customers was acting as guarantor for the other. Only an “individual” can be a guarantor for this purpose, and only when she “becomes obligated to perform as an additional obligor on a consumer lease” for one of two reasons: either (i) the original lessee does not meet the lessor’s credit standards, or (ii) the origi-

³⁷⁶ *Id.* § 204(b). This would rarely if ever be the case with a motor vehicle lease where insurance is always required, but the notice might alert the consumer lessee to add the newly leased computer or piano to her homeowner’s insurance policy.

³⁷⁷ *Id.* § 204(c).

³⁷⁸ *Id.* § 204(d).

³⁷⁹ See, e.g., U.C.C.C. § 3.208 (2002).

³⁸⁰ FTC Trade Regulation Rule on Credit Practices, 16 C.F.R. § 444.3(a)(2) (2002).

³⁸¹ U.C.L.A. § 205.

³⁸² *Id.* § 102(a)(6).

nal lessee is already in default under the lease.³⁸³ In both these situations, the lessor is likely to be quite aware that it is demanding, or being offered, a guaranty obligation. Indeed, it may be hoped, at that point *all* the parties (including the guarantor) understand that special circumstances require the addition of the guarantor to the lease contract, and the required Notice confirms that fact. Where spouses, relatives, or friends shop, negotiate, and sign a lease together, the lessor may consider them co-lessees, and need not inquire about any understandings between them as to payment responsibility.³⁸⁴ Nor is the leasing dealer a "guarantor" when it assigns the lease with recourse.³⁸⁵

This is a setting where we can wish it were clearer whether the Equal Credit Opportunity Act applies to leases.³⁸⁶ Under that act it is considered discriminatory, and unlawful, for a creditor to require a co-signatory "if the applicant qualifies under the creditor's standards of creditworthiness."³⁸⁷ Prudent lessors will hew to the Regulation B limitation on co-signers, as well as to the U.C.L.A. notice requirement.

C. *Post-Closing Disclosures/Notifications*

In the U.C.L.A. there are a number of situations after the consummation of a consumer lease where the lessor or current holder must give notices or information to the lessee. Generally these are not complex theoretically or operationally, and may be summarized here. Some are discussed further in the context of other U.C.L.A. provisions. Together they reinforce the "transparency" principle noted above.

1. A lessee must get a written receipt for payments made in cash;³⁸⁸
2. The holder must provide statements, on request, of—
 - Payments made and balances owing;
 - A payoff figure (or estimate) if the lease is terminated

³⁸³ *Id.*

³⁸⁴ As co-lessees, in theory both have received or have access to all the basic disclosures for the transaction. A true "guarantor" can get a full copy of the lease on request. *Id.* § 205(a)(2).

³⁸⁵ *Id.* § 102(a)(6)(B).

³⁸⁶ See *supra* notes 146-48 and accompanying text.

³⁸⁷ 12 C.F.R. § 202.7(d)(1) (2002). The concern is about creditors who routinely require spousal co-signers, but the provision equally bars the creditor from insisting on a co-signature from any "other person." *Id.*

³⁸⁸ U.C.L.A. § 206(a)(1).

early;

- A purchase option price, if available.³⁸⁹
- 3. After a lease is fully paid off, the holder must give the lessee a "paid-in-full" copy or other "record of satisfaction."³⁹⁰
- 4. A lessor must give a notice of "spot-delivery" rights,³⁹¹ and the lessee must separately sign a notice obligating him for mileage charges in that situation.³⁹²
- 5. A lease may "provide for" a security deposit and certain incidental security interests,³⁹³ and for default charges and attorney's fees,³⁹⁴ i.e. those interests or charges must appear in the lease.
- 6. A holder must "account to the lessee" for the application of a security deposit.³⁹⁵
- 7. A consumer lessee may safely send payments to a prior holder of the lease until the lessee is notified that the lease has been assigned.³⁹⁶
- 8. Any limitation on a lessee's right to sublease the goods must be in a "specific and conspicuous provision" in the lease.³⁹⁷
- 9. A holder must notify the lessee of the purchase of substitute insurance before the premium can be folded into the lease and subjected to a rent charge.³⁹⁸
- 10. Before repossession or collection, the holder must give the

³⁸⁹ *Id.* § 206(a)(2)(A)-(C), (3).

³⁹⁰ *Id.* § 206(b).

³⁹¹ *Id.* § 301(b).

³⁹² *Id.* § 301(b)(2).

³⁹³ *Id.* § 303(b).

³⁹⁴ *Id.* § 304(c)-(d).

³⁹⁵ *Id.* § 303(d).

³⁹⁶ *Id.* § 305(a). Where the U.C.L.A. states simply that, after notice, the lessee's obligation is discharged only by paying the assignee, Connecticut adds a non-uniform amendment requiring the assignor who receives a misdirected payment to return it to the lessee or forward it to the assignee. CONN. U.C.L.A. § 22(a)(2), 2002 Conn. Pub. Acts 02-81 (Reg. Sess.).

³⁹⁷ U.C.L.A. § 306(b). The adjectives are borrowed from section 2A-303(7) of the U.C.C.

³⁹⁸ *Id.* § 308(d)(1).

lessee formal notice of the lessee's right to cure a default.³⁹⁹

11. A lease may contain a formula for early termination liability, i.e., it must be explicit in the lease.⁴⁰⁰
12. A lease may provide for excess wear and use, and excess mileage, charges,⁴⁰¹ and:
 - For non-vehicle leases, the holder must send prompt notice of imposition of excess wear and use charges;⁴⁰²
 - For vehicle leases, the holder cannot collect excess wear and use charges unless:
 - it sends a pre-expiration inspection notice;
 - within 60 days after the vehicle is returned it sends notice of latent or uninspected wear and tear.⁴⁰³

If all of these disclosure and notice provisions function as designed, they should bring to consumer leases a healthy degree of transparency as to how leases work and what are the lessee's risks and obligations in the process. In conjunction with the transactional disclosures under the C.L.A., this Act should produce a considerable degree of standardization of terminology and format, which can only be helpful for consumers who want to understand the lease and avoid surprises over its term.

D. *Obituary for "Lease Rate" Disclosure*

Of all the disclosure matters considered by the U.C.L.A. Drafting Committee, none took more time and energy than the quest for a "lease rate" formula that had computational integrity and informational value to consumers. In the end, the Committee despaired that it could be done, and removed any mention of a lease rate disclosure from the Act.

As noted earlier, in its mid-1990s revision of Regulation M, the Federal Reserve Board seriously considered either requiring or authorizing the use of lease rate figures in consumer leases, but concluded that there were too many variables in the pricing of leases to make any lease rate formula reliable as a truly comparable expression of the cost of leasing or a basis

³⁹⁹ *Id.* § 402(c).

⁴⁰⁰ *Id.* § 405(a).

⁴⁰¹ *Id.* § 407(a)(3) & (f).

⁴⁰² *Id.* § 407(c)(1).

⁴⁰³ *Id.* § 407(e)(1)-(3).

for comparing a lease to a credit sale.⁴⁰⁴ The primary problem is that the residual values used, especially in auto leases, are estimates of future value, and are so subject to variation from car to car, dealer to dealer, and time to time, that a rate iteration based on a disclosed residual value number is largely meaningless and impossible to compare across transactions.⁴⁰⁵

Interestingly, in a private paper shared with the Drafting Committee's Lease Rate Task Force, an industry lawyer developed the thesis that there were sufficient legal, economic, and competitive restraints on lessors to dissuade them from setting artificially low residual values.⁴⁰⁶ To the extent this thoughtful paper gave limited support to the feasibility of a lease rate disclosure, it drew no broader industry support among the U.C.L.A. Observers.⁴⁰⁷ The Drafting Committee reprised the Federal Reserve Board's examination of the topic, and commissioned a Task Force of Committee members and Observers to examine it further. Up through the U.C.L.A. first reading at the N.C.C.U.S.L. meeting in 1999, the working drafts included a tentative lease rate provision, authorizing (but not requiring) disclosure of a lease rate, and including the algorithm and other specifications for computing that rate from components of the lease pricing.⁴⁰⁸ The premise was to devise a lease rate that was calculated similarly to the APR in credit transactions; no serious attention was given to inventing a new, distinctive kind of rate figure for leases.

Eventually, by a close vote, the Committee determined to drop the lease rate matter from the Act. This was not before one state, Connecticut, had taken the U.C.L.A.'s draft lease rate provisions (which were noted to be tentative and incomplete), and enacted them into law,⁴⁰⁹ originally to become effective in 2001 but then deferred until 2002. There were extended discussions between industry representatives and Connecticut officials to see whether the enacted law could be refined to a workable compu-

⁴⁰⁴ See *supra* notes 59-66 and accompanying text.

⁴⁰⁵ Thus, by lowering the estimated residual value (and thus increasing the amount of the monthly payments applied to depreciation), a lessor could substantially lower the "lease rate" based on that residual. The Federal Reserve Board considered using the purchase-option price as the future-value figure in a rate calculation, on the theory that this was likely to be a more realistic valuation than the stated residual value. 61 Fed. Reg. 52,246, 52,255 (Oct. 7, 1996). What the Drafting Committee came to appreciate was that probably the only way to hope to assure computational integrity and comparability in a lease rate was to standardize the setting of residual values, such as by applying some universal depreciation curve. This was not only impractical as an operational matter, and would probably produce *less* reliable residual value numbers, but it was a political non-starter both for the Committee and the observers. See *id.*

⁴⁰⁶ Memorandum from Randall McCathren, Bank Lease Consultants, Inc., to Richard Mossburg, Ford Motor Credit Co. (Mar. 4, 1997) (on file with author).

⁴⁰⁷ *Id.*

⁴⁰⁸ See NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, U.C.L.A. Draft No. 7 §§ 203(c), 207 (Mar. 1999), available at <http://www.law.upenn.edu/bll/ulc/consleas/cia399.pdf> (last visited Nov. 9, 2002) (on file with the Connecticut Law Review).

⁴⁰⁹ CONN. GEN. STAT. §§ 42-158a-g (2001).

tation and meaningful disclosure, but these were inconclusive and the effective date loomed closer and closer. The vehicle leasing industry was adamantly opposed to the lease rate legislation, for the same reasons they opposed it at the Federal Reserve Board and in the U.C.L.A. drafting process—the disclosed lease rate would be unreliable as a measure of the cost of leasing and would be subject to manipulation by unscrupulous lessors.

The industry's willingness to support enactment of the U.C.L.A. in Connecticut therefore has an easy explanation: In exchange for adoption of the U.C.L.A., Connecticut would repeal its lease rate law. That is what has happened.⁴¹⁰ The U.C.L.A. was perceived by the industry as the lesser of evils if lease rate is one of them.

E. *Electronic Documentation and Disclosure*

With the enactment of the federal Electronic Signatures in Global and National Commerce Act (E-SIGN)⁴¹¹ in 2000, and the promulgation of the parallel Uniform Electronic Transactions Act in 1999, the commercial and consumer markets have officially entered the world of "e-commerce," and the impact of those laws on the U.C.L.A. should be noted, however briefly.

Except in two places, the U.C.L.A. does not require that documentation and disclosures be in a conventional writing.⁴¹² Instead, the term "record" is used throughout the Act⁴¹³ to authorize documentation in electronic format. Additionally, the term "sign" is defined (consistently with the U.C.C., U.E.T.A., and E-SIGN) to include various forms of electronic authorization.⁴¹⁴ U.C.L.A. § 111 generally exercises a state's right to opt out of coverage by E-SIGN to avoid technical preemption by the federal law. With U.E.T.A. now adopted in most states for the same purpose, it provides a basis for opt-out from the federal law. Thus it is possible for there to be an entirely paperless consumer lease under the U.C.L.A.⁴¹⁵

⁴¹⁰ CONN. U.C.L.A. §§ 49-50, 2002 Conn. Pub. Acts 02-81 (Reg. Sess.).

⁴¹¹ 15 U.S.C. §§ 7000-7021 (2000).

⁴¹² U.C.L.A. requires a writing for a copy of the lease and related documents given to the consumer at lease consummation, and receipts for cash payments. U.C.L.A. § 203(e) (2002); *id.* § 206(a)(1).

⁴¹³ "Record" is defined in the U.C.L.A. to mean "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form." U.C.L.A. § 102(a)(14). This is intended to be consistent with the same term in the E-SIGN Act, 15 U.S.C. § 7006(9), in the U.E.T.A., U.E.T.A. § 2(13) (2002), and in the U.C.C., U.C.C. § 1-201(31) (2002).

⁴¹⁴ U.C.L.A. § 102(a)(15). According to these sections "sign" means:

(A) to execute or adopt a tangible symbol with the present intent to authenticate a record; or
(B) to attach or logically associate an electronic symbol, sound, or process to or with a record with the present intent to authenticate a record.

Id.

⁴¹⁵ See Kenneth J. Rojc & Gregory Eidukas, *The Electronic Approach to Motor Vehicle Financing: An Emerging Road Map*, 57 BUS. LAW. 1175 (2002).

To this simple conclusion there is the qualification that, under E-SIGN, consumer disclosures otherwise required by law to be in writing may be given in electronic form only if the consumer has consented to disclosure in that manner.⁴¹⁶ E-SIGN sets out a rather elaborate consent mechanism, to assure not only that the consumer agrees to electronic disclosure, but also has the ability to access the information electronically through a computer terminal.⁴¹⁷ Issues involving consumer consent and electronic documentation will inevitably arise, and consumer lawyers are already anticipating problematic marketing practices that may emerge.⁴¹⁸

VI. LIMITATIONS ON LEASE PRACTICES AND PROVISIONS

A core component of the U.C.L.A. are provisions restricting certain lease provisions or practices that otherwise could be abusive of consumers.

A. "Classic" Restraints

Some U.C.L.A. provisions follow long-standing prescriptions applicable to credit transactions, and were never very controversial in the U.C.L.A. drafting process.

1. "Good Faith"

Like the U.C.C., the U.C.L.A. imposes a universal obligation of good faith on all parties to a consumer lease.⁴¹⁹ The phrase "good faith" is defined expansively to include not just subjective honesty but also "observance of reasonable commercial standards of fair dealing."⁴²⁰ Since a lack of good faith would violate this Act, presumably an aggrieved consumer could recover provable actual damages caused by the bad faith conduct.

2. Unconscionability

Like U.C.C. Article 2A,⁴²¹ the Act proscribes unconscionable lease provisions, and also unconscionable conduct in the inducement of a consumer lease or the collection of a lease claim.⁴²² Thus, a court may fashion

⁴¹⁶ 15 U.S.C. § 7001(c)(1).

⁴¹⁷ *Id.* § 7001(c); see R. Cook & N. Munro, *Giving Consumer Disclosures on-Line: Is E-SIGN the Path to the Paperless Loan*, 57 BUS. LAW. 1187, 1188-91 (2002) (explaining the consumer consent procedures and the disclosure of hardware and software requirements mandated by E-SIGN); James A. Huizinga et al., *Electronic Disclosures Under the Federal Reserve Board's Consumer Protection Regulations*, 57 BUS. LAW. 1197, 1200-02 (2002) (delineating the general application of the E-SIGN consent requirement and the exceptions thereto).

⁴¹⁸ NAT'L CONSUMER L. CTR., TRUTH IN LENDING § 9.3.2.4.2 (4th ed. 1999 & Supp. 2001).

⁴¹⁹ U.C.L.A. § 109.

⁴²⁰ *Id.* § 102(a)(4).

⁴²¹ U.C.C. § 2A-108 (2002).

⁴²² U.C.L.A. § 110(a)-(b).

any appropriate remedy if unconscionability is proved.⁴²³ While unconscionability is "a matter of law,"⁴²⁴ rather than a jury issue, the court must afford the parties an opportunity to put on evidence "as to the setting, purpose, and effect" of the lease and related conduct.⁴²⁵

Also comparably to U.C.C. Article 2A, the U.C.L.A. mandates that a lessee who successfully asserts unconscionability be awarded attorney's fees, and the size of the attorney's fee award is not controlled by the amount of the lessee's recovery in the case.⁴²⁶ For instance, the court might refuse to enforce an oppressive lease provision but without any monetary award to the consumer lessee; the lessee would still be entitled to "reasonable" attorney's fees, measured by time spent, degree of difficulty of the issue, and similar factors traditionally used to set attorney's fee awards. There is a flip side to this attorney's fee matter. If the court finds that the lessee knew the unconscionability claim to be groundless, it "shall" award attorney's fees to the holder or other party against which the unconscionability claim was asserted.⁴²⁷ Whether this prospect will chill unconscionability claims remains to be seen.⁴²⁸ Perhaps to avoid that prospect, the Connecticut U.C.L.A. omits all reference to groundless claims and consumer liability for the lessor's attorney's fees.⁴²⁹

3. *Waivers of Rights*

A consumer cannot waive rights and protections afforded by the U.C.L.A. except in the course of settling a dispute or collection claim, and even then a court may invalidate the settlement if it is unconscionable.⁴³⁰

⁴²³ See *id.* (explaining the appropriate remedies for unconscionability).

⁴²⁴ *Id.*

⁴²⁵ *Id.* § 110(c).

⁴²⁶ *Id.* § 110(d)(1), (3).

⁴²⁷ *Id.* § 110(d)(2).

⁴²⁸ At N.C.C.U.S.L.'s second reading of the U.C.L.A. in August 2001, a motion passed to change "shall" to "may" in subsection 110(d)(2). The thought was that courts should have discretion to determine whether a consumer should be required to pay the holder's attorney's fees. The industry delegation that was meeting regularly with the Drafting Committee during the Conference sessions insisted that the statutory language in subsection 110(d)(2) revert to "shall" to maintain symmetry with subsection 110(d)(1)—if the unconscionable merchant must pay the other side's attorney's fees, so should the groundless accuser. The Conference reconsidered and returned to "shall" in subsection 110(d)(2). The industry's victory on this point may have been mainly symbolic, for a court reluctant to award attorney's fees against a consumer lessee need only find that the consumer did not "know" the unconscionability claim to be groundless, or that the unsuccessful unconscionability claim was not quite "groundless." *Id.*

⁴²⁹ CONN. U.C.L.A. § 10(d), 2002 Conn. Pub. Acts 02-81 (Reg. Sess.). Specifically, the Connecticut version omits subsection (d)(2) of the U.C.L.A. *Id.*

⁴³⁰ *Id.* § 107.

In this connection the U.C.L.A. ducks what has been a steaming debate over the enforceability of mandatory arbitration clauses in consumer contracts.⁴³¹ Do such clauses constitute impermissible waivers of remedial rights and procedures that the consumer lessee might avail in litigation, including discovery, class actions, and jury trial? The drafters say only that a mandatory arbitration clause "does not *per se* constitute a waiver of rights or remedies under this Act,"⁴³² leaving the courts to grapple with the issue on their own.

4. *Prohibited Lease Provisions*

U.C.L.A. section 302 bans several types of contract provisions that have long been disfavored in consumer credit transactions:

- Insecurity clauses;⁴³³
- Confession of judgment or assignment of wages;⁴³⁴
- Repossession involving trespass or breach of the peace.⁴³⁵

Any such clause or provision is unenforceable, but does not invalidate the whole lease.⁴³⁶

5. *"Referral" Inducements*

Once upon a time there was evidence that some merchants would induce customers into credit transactions by promising that the customer would earn credits or rebates against his own obligation by providing the merchant with leads to additional customers. "Referral" inducements of

⁴³¹ See Alan S. Kaplinsky & Mark J. Levin, *Consumer Financial Services Arbitration*, 56 BUS. LAW. 1219 (2001) (reviewing recent Supreme Court and U.S. Court of Appeals opinions, which provide guidelines for the use of mandatory consumer arbitration clauses in the financial services arena); Julia B. Strickland et al., *Recent Developments in Consumer Financial Services Arbitration*, 118 BANKING L.J. 933 (2001) (discussing recent developments concerning the use of mandatory arbitration clauses in consumer credit agreements); Richard E. Speidel, *Consumer Arbitration of Statutory Claims: Has Pre-Dispute [Mandatory] Arbitration Outlived Its Welcome*, 40 ARIZ. L. REV. 1069 (1998) (concluding that mandatory arbitration clauses in consumer contracts are no longer useful where statutory claims are involved).

⁴³² U.C.L.A. § 107 cmt. 3.

⁴³³ *Id.* § 302(a)(1) (banning clauses that permit acceleration or repossession whenever the holder feels insecure); *cf.* U.C.C. § 1-208 (2002) (permitting clause if exercised in good faith).

⁴³⁴ U.C.L.A. § 302(a)(2); *cf.* FTC Credit Practices Rule, 16 C.F.R. § 444.2(a)(1)-(3) (2002) (establishing that an obligation to confess judgment or assign wages is an unfair credit practice); U.C.C. §§ 3.305, 3.306 (2002) (banning a creditor from taking an assignment of earnings or confession of judgment).

⁴³⁵ U.C.L.A. § 302(a)(3); *cf.* U.C.C. § 5.112 (prohibiting creditor from taking possession of collateral by entering a dwelling and using force or breaching the peace).

⁴³⁶ U.C.L.A. § 302(b), cmt. 2.

this sort have long been frowned on by courts⁴³⁷ and legislatures⁴³⁸ because of the likely misrepresentation they contain. Vulnerable consumers will assume that the referral earnings will be significant, when in reality few of the consumers' friends, neighbors, or relatives will respond to the merchant's solicitation (if the merchant makes any).⁴³⁹ To be successful through several rounds of referral sales, the promised referral earnings would require so many customers as to make the scheme unworkable and the projected earnings illusory.⁴⁴⁰

Whether such practices will continue in the new century is questionable. Nonetheless, the U.C.L.A.⁴⁴¹ continues the U.C.C.C.'s animosity toward referral inducements. The drafters make clear that "what is prohibited is an inducement offered *prior to* lease consummation that depends on events occurring *after* lease consummation."⁴⁴² Thus, referral earnings arrangements are permissible only when a lessor pays or credits the referring customer before the lease is signed, or when the lessor offers the customer referral earnings after the lease is signed.

B. *More Innovative Restraints or Requirements*

In a number of areas the U.C.L.A. echoes existing limitations from the world of credit transactions, but the new provisions are crafted specifically with leases in mind.

1. *Limitations on Security Interests; Security Deposits*

Since a lease by definition leaves ownership of the goods with the lessor, the lease cannot simultaneously take a security interest in those goods—a lease and security interest are mutually exclusive.⁴⁴³ Further, a lease may not "cross-collateralize" the lease obligation by taking a security interest in other property of the lessee—a residence, a second car, or household goods, for example.⁴⁴⁴ But a consumer lease *may* include a se-

⁴³⁷ See *Norman v. World Wide Distributors, Inc.*, 195 A.2d 115, 117 (Pa. Super. Ct. 1963) (holding that referral sales are "a fraudulent scheme . . . similar to the recurrent chain letter racket"); *Brad-dock v. Family Finance Corp.*, 506 P.2d 824, 826, 829 (Idaho 1973) (holding, over strong dissent, that a pre-U.C.C.C. referral scheme was not an illegal lottery).

⁴³⁸ U.C.C.C. § 3.309 (2002). This is one of the 1974 U.C.C.C. provisions that specifically applies to leases.

⁴³⁹ *Norman*, 195 A.2d at 116.

⁴⁴⁰ *Id.* at 117.

⁴⁴¹ U.C.L.A. § 309.

⁴⁴² *Id.* cmt. 2.

⁴⁴³ U.C.C. § 2A-103(1)(j) (2002) ("[R]etention or creation of a security interest is not a lease."). The U.C.L.A. implicitly recognizes this by acknowledging that a holder may make a precautionary filing under U.C.C. Article 9 against the eventuality that the "lease" of goods is determined in fact to be a security interest in those goods. U.C.L.A. § 303(c), cmt. 2. Precautionary security interest language in the lease itself should not be considered to violate the U.C.L.A. *Id.* § 303(b).

⁴⁴⁴ U.C.L.A. § 303(a).

curity interest in various payments or coverages contemplated as part of the lease transaction—rebates of unearned insurance or service contract charges if the lease is terminated early, or the benefits of insurance or service contracts.⁴⁴⁵ These sums or coverages may be payable to the holder in the first instance, or may be payable to the lessee under a separate policy or contract; allowing the holder a security interest in them helps assure the lease holder a priority claim to those funds or benefits as against third parties and the right to apply them on the consumer's lease obligation. The U.C.L.A. also allows the lessor to take a security interest in an "accession" to the leased goods⁴⁴⁶—an upgraded sound or satellite navigation system, for example—but leaving priority rights to be determined under the U.C.C.⁴⁴⁷

As to security deposits, the U.C.L.A. takes a very permissive posture, permitting such deposits or other prepayments in any amount, with no requirements as to segregating or accruing interest on those funds, and subject only to an accounting for the security deposit when it is applied.⁴⁴⁸ This approach accepts the economic premise that any front-loaded payments, from a simple security deposit to full payment of the lease obligation (as in a single-payment lease), reduces the lessor's risk and thus the consumer's overall cost for the lease.⁴⁴⁹

2. Insurance Charges

The U.C.L.A. addresses several issues relating to insurance sold in connection with a consumer lease. For one, a lessor cannot "upcharge" for casualty, liability, or credit insurance, when sold in connection with a consumer lease.⁴⁵⁰ Compensation for the lessor is built into the premium as commissions, experience rebates, or the like, and there is no need to allow lessors to fatten their yield even further. Historically, the problem with insurance as a "tied" product in credit transactions is the reverse-competition effect it can produce: The more expensive the insurance offered to customers, the greater the dealer's yield. Limiting insurance charges in the lease to the insurer's premium prevents at least the most blatant overcharges.

The U.C.L.A. also clarifies the treatment of insurance premium rebates. Insurance on the leased goods, or credit insurance protecting against the lessee's ability to pay, are usually written for a term, either the full duration of the lease, or one year (or other period) at a time. If the lease is

⁴⁴⁵ *Id.* § 303(b)(1)-(2), cmt. 3.

⁴⁴⁶ *Id.* § 303(b)(4).

⁴⁴⁷ *Id.* cmt. 6 (referencing U.C.C. sections 2A-310 and 9-335).

⁴⁴⁸ *Id.* § 303(d).

⁴⁴⁹ U.C.L.A. § 303 cmt. 3.

⁴⁵⁰ *Id.* § 308(a).

terminated or the insurance is cancelled for some other reason, there may be a refund due for that portion of the premium not yet earned. Who gets to keep that rebate? If the rebate is payable directly to the lessee, there is little doubt she can keep it—she paid the premium, or continues to be obligated to pay for it. But if the rebate comes to the holder of the lease, how is it to be applied? The U.C.L.A. answer is simple: Fairly. The rebate must be either refunded to the lessee, or explicitly credited to obligations the lessor owes under the lease.⁴⁵¹

Then there is the matter of substitute, or “force-placed,” insurance. Where a lease requires certain insurance coverage, most likely casualty or liability insurance, and the lessee fails to maintain that insurance, the holder may purchase substitute insurance, so long as it covers substantially the same risks affecting the interests of either party.⁴⁵² That is, the holder can buy true replacement insurance, but cannot buy more extravagant coverages, at extravagant costs, and pass that expense on to the consumer lessee.⁴⁵³ The cost of true substitute insurance can be added to the lessee’s obligation under the lease, may incur rent (*i.e.*, interest) charges, and is subject to the repayment and default provisions of the lease.⁴⁵⁴ The adjustments to rent charges and capitalized cost resulting from replacement insurance may marginally change the consumer’s obligation and payment schedule, but this does not amount to a refinancing that would require a whole new set of disclosures.⁴⁵⁵

3. *Unwinding the Failed Transaction: “Spot Delivery”*

Visualize a sales cubicle at an auto dealership, 7:30 in the evening. A consumer has selected a car to lease, has signed and submitted an application for credit approval, has gotten all appropriate disclosures, has written a check for the initial payment under the lease, and has handed over the keys to the trade-in vehicle. The dealership does not have on-line credit approval (from third-party financiers) at that time of day, so everyone understands that the “deal” is subject to credit approval in the morning. The consumer may agree to come back at that time to take delivery of the car.

⁴⁵¹ *Id.* § 308(b). It may be credited to the next monthly payment, the final payment under the lease, or other obligation the lessee will owe on termination of the lease. *Id.* § 308(b)(2). If the holder retains the money for application to any of these obligations, it must also credit the lessee with the “unearned portion of the rent charge applicable to the refunded premium.” *Id.* For example, if credit insurance for the duration of the lease is packaged into the capitalized cost, and subsequently cancelled, the credited refund of insurance premium must include the marginal interest charge attributable to that part of the adjusted capitalized cost.

⁴⁵² *Id.* § 308(c).

⁴⁵³ Nor, for that matter, could the holder buy—at lessee’s expense—drastically *less* extensive coverage than was required under the lease. That is not “substitute insurance . . . against substantially the same risks.” *Id.*

⁴⁵⁴ *Id.* § 308(d).

⁴⁵⁵ *Id.* cmt. 3.

Or, more likely, the dealer will "spot deliver" the car, and the consumer drives it home.

From one perspective, spot delivery is a response to customer demand ("Since you've taken my old car in trade, I need the new one to drive myself home tonight") and convenience ("I'd rather not have to come back tomorrow"). It also commits the customer to the deal even though the credit approval is deferred. But what happens in the occasional case where credit is not approved the next day, or the dealer finds some other reason⁴⁵⁶ not to finalize the lease? The dealer will have already deposited the customer's down payment check, may have disposed of the trade-in, and will demand return of the new car unless the customer agrees to new terms that satisfy the credit or other problem. The customer is reluctant to abandon the deal, and certainly does not want the scruffy trade-in back. This presents an obvious temptation for the dealer to leverage the consumer into a new, more expensive lease, or at least to confront the consumer with the challenge of undoing the failed transaction, retrieving the trade-in and recovering the down payment.

The U.C.L.A. constrains possible abuse in this pattern by setting out some flat "dos" and "don'ts." One boundary is that the lessor may not dispose of the consumer's trade-in until the lessee's application is approved.⁴⁵⁷ Secondly, if the customer's application is disapproved, the lessor must promptly return the trade-in⁴⁵⁸ and any payment the consumer may have made,⁴⁵⁹ but if the lessor has spot-delivered the goods, the lessor need not tender back the trade-in or payment until the customer tenders back the goods.⁴⁶⁰

Specifically in a motor vehicle lease, if the lessor wants to spot-deliver the goods and be able to take them back on disapproval of the customer's application, the choreography gets more complex. On or before delivery of the goods the lessor must give the consumer an explicit notice (call it a "spot delivery notice") of the customer's right to a refund of the down payment and return of the trade-in.⁴⁶¹ Furthermore if the lessor wants to be able to charge the customer for use of the vehicle in the interim, the notice

⁴⁵⁶ The reasons for disapproval are not always bad credit, but could include mistaken or erroneous entries in the application or the lease itself, such as use of the wrong residual value or miscalculation of monthly payments.

⁴⁵⁷ *Id.* § 301(c).

⁴⁵⁸ *Id.* § 301(a)(1)(A). The lessor must "tender back" the trade-in "within one business day" after disapproval of the customer's application. *Id.*

⁴⁵⁹ *Id.* § 301(a)(1)(B). The payment must be refunded "promptly, but in no event more than five business days after disapproval of the application." *Id.* While the trade-in is presumably sitting on the dealer's lot and can be returned forthwith, it may take several days for the lessor to process and issue a refund check for the down payment. Thus the longer time allowed for the refund.

⁴⁶⁰ *Id.* § 301(a)(2).

⁴⁶¹ *Id.* § 301(b).

must specify the "fact and amount" of the charge, and be separately signed by the customer at delivery.⁴⁶² The amount of the charge is capped at the mileage rate set for deductions under state or federal tax laws.⁴⁶³ To all this is added the common-sense qualification that, whether or not the lessor has given a spot-delivery notice, the lessee may still be liable for damage to the vehicle that is the lessee's fault.⁴⁶⁴

These provisions should discourage the worst of sharp dealing by lessors in the context of spot-delivered motor vehicles. But at best the U.C.L.A. can help customers understand the risks of taking delivery before approval of their applications. The real dynamic is that the customer has made the emotional commitment to "new wheels," and does not want to rescind the deal⁴⁶⁵ and start shopping all over again. When the lessor then advises the customer that the lease cannot be finalized without some changes to its terms, it will be the uncommon case where the customer walks away from the transaction. Ultimately, the policing of bad spot delivery practices may rest as much on claims under state U.D.A.P. statutes as under this Act.

4. Assignee Liability

Section 305(b) of the Act generally abolishes holder-in-due-course protections for financial entities that acquire a lease from the lessor by assignment or sale, thus making the law for consumer leases substantially identical to that for credit sales.⁴⁶⁶ For credit sales, federal and state laws have outlawed third-party immunity from consumer claims and defenses for nearly thirty years,⁴⁶⁷ and in the U.C.L.A. drafting process it was a given that the new act would do likewise. Where the dominant FTC Holder Rule accomplishes its objective by requiring that every credit sale contract contain a specified "Notice" that preserves claims and defenses, the U.C.L.A. merely states dispositively that "a holder is subject to all claims

⁴⁶² *Id.*

⁴⁶³ *Id.* § 301(b)(2). A legislative note following section 301(b)(2) suggests a preference for a mileage rate under *state* law, but Connecticut opted for the federal rate. CONN. U.C.L.A. § 18(b)(2), 2002 Pub. Acts No. 02-81.

⁴⁶⁴ U.C.L.A. § 301(b)(3). This is to discourage joy-riding or other reckless driving at the lessor's expense. It would include loss of the vehicle by government forfeiture or confiscation. *Id.* It is not crystal clear whether these limitations must be mentioned in the "spot delivery notice," but prudent practice would include them.

⁴⁶⁵ The provisions discussed here are not really "rescission." That assumes a contract has been fully made, while here the lessor has temporarily withheld its commitment to the lease. There is nothing in the U.C.L.A. that gives lessees a true "right of rescission" or "cooling-off period" as applies in door-to-door sales or second mortgages. At one drafting session, the Reporter floated a mild, optional 24-hour "cooling off" mechanism. No one in the room supported it.

⁴⁶⁶ U.C.L.A. § 305(b).

⁴⁶⁷ FTC Trade Regulation Rule on Preservation of Consumers' Claims and Defenses, 16 C.F.R. §§ 433.1-433.3 (2002). See discussion *supra* Part II E.1.d.

and defenses arising from the lease which the lessee could assert against a previous holder."⁴⁶⁸

This "preservation" rule applies to consumer *claims* and *defenses* arising from the lease.⁴⁶⁹ The most common examples would likely be warranty claims, late or non-delivery, failure to repair, or similar failures by the lessor to honor its lease obligations. Lessor fraud would be another. The consumer is clearly entitled to assert this kind of mis- or malfeasance as a defense or counterclaim to collection efforts by a subsequent holder. As under the FTC Rule, a consumer could also assert a separate affirmative claim against the subsequent holder, such as for revocation of acceptance, but the holder's liability is capped at the amounts the consumer has paid.⁴⁷⁰

Several aspects of this rule bear noting. One is its extension to leases that approximate, but are not quite, finance leases under U.C.C. Article 2A.⁴⁷¹ In finance leases the lessor is essentially the financier of the lease; the lessor acquires the goods from a supplier specifically to be leased to a consumer, and the supplier's warranties are passed through to the lessee.⁴⁷² Article 2A recognizes that a consumer may assert claims and defenses based on the supplier's warranties against the finance lessor, and the U.C.L.A. affirms that result. But the U.C.L.A. language refers to any situation in which "the original lessor does not select, manufacture, or supply the goods."⁴⁷³ This might be referred to as a quasi-finance lease; it does not meet the definition of finance lease in Article 2A, most likely because the finance lessor has not specifically forwarded the supplier's warranty information to the lessee. In any such quasi-finance lease, the consumer may still assert against the nominal lessor and subsequent holders any claims or defenses arising from supplier warranties.⁴⁷⁴

A second issue lurking in this assignee-liability provision is how it operates when lease obligations are securitized. Frequently these days all

⁴⁶⁸ U.C.L.A. § 305(a).

⁴⁶⁹ *Id.*

⁴⁷⁰ *Id.* § 305 cmt. 3 (providing guidance on measuring this cap). Note that the U.C.L.A. rule, and the FTC Holder Rule that it emulates, differ from the U.C.C. in permitting the consumer an affirmative recovery from the holder. While U.C.C. section 3-305(a)(3) permits an obligor to assert a "claim in recoupment" against a non-holder in due course, this is limited to an offset against any amount still owing on the instrument. U.C.C. § 3-305 cmt. 3 (2002).

⁴⁷¹ U.C.L.A. § 305(b), cmt. 1.

⁴⁷² U.C.C. § 2A-209.

⁴⁷³ U.C.L.A. § 305(b).

⁴⁷⁴ Nothing in the U.C.L.A. provision, or in U.C.C. Article 2A, requires a supplier to make any warranties, or prohibits disclaimers or remedy limitations, in the supply contract. Whether the consumer has claims or defenses to assert against the finance lessor and subsequent holders therefore depends altogether on what is in the supplier's sale contract to the lessor. Or, if the pending revisions to U.C.C. Article 2 are adopted (specifically new sections 2-313A and 2-313B), the supplier may have warranty responsibilities directly to the consumer lessee based either on the supplier's advertising or on an explicit warranty packaged with the goods.

forms of consumer receivables, from credit card account balances to mortgage loans, are transferred in bulk and packaged as securities to be sold in the larger investment markets.⁴⁷⁵ The question is who then is the "holder" subject to a consumer's claims and defenses? The U.C.L.A. Comments offer some guidance by suggesting that in a securitization the "holder" is "the special purpose vehicle, trustee, or other entity that holds title to the leased goods" and not "a mere servicing agent, nor the securities investors who have only beneficial or nominal ownership interests."⁴⁷⁶ In any event it seems clear that securitization should not operate to deprive consumers of the right to assert claims and defenses against downstream holders.

There is a further significant limitation on the U.C.L.A. assignee-liability rule as it applies to claims and defenses based on a lessor's violation of the U.C.L.A. itself (as opposed to a breach of the lease contract). By inference in section 305(b) and by black letter in section 505(b), an assignee or holder is generally subject to vicarious liability for violations of the U.C.L.A., either actual damages or in some cases statutory damages.⁴⁷⁷ This means a consumer could not only set up a violation of the Act as a defense or claim in recoupment to defeat a holder's collection action, but could sue the holder directly for the sins of its assignor.⁴⁷⁸ However, for violations of specified U.C.L.A. disclosure provisions, an assignee is exposed only if the violation is evident on the face of the lease documentation. This parallels a protective rule in the federal C.L.A.⁴⁷⁹ The effect is that an assignee's due diligence as to transaction paperwork and disclosure need not go beyond the face of that paperwork. Case law under the federal T.I.L.A. consistently holds that this "apparent on the face" test will be applied literally: Unless the disclosure forms are facially irregular, an argument that the assignee knew or should have known of violations beneath the surface will be unavailing.⁴⁸⁰ This is actually an odd juxtaposition of rules. The assignee is liable for disclosure violations only when they are

⁴⁷⁵ See Kurt Eggert, *Held Up In Due Course: Predatory Lending, Securitization, and the Holder In Due Course Doctrine*, 35 CREIGHTON L. REV. 503, 545 (2002) (providing a detailed review and analysis of the similar securitization processes involving subprime mortgage loans, and a strong recommendation that consumer rights be preserved throughout the securitization process). See generally Stuart M. Litwin, *Unlocking the Mysteries of Auto Lease Securitization*, 3 THE FINANCIER 22, 24-27 (1996).

⁴⁷⁶ U.C.L.A. § 102(a) cmt.

⁴⁷⁷ *Id.* §§ 305(b), 505(b); *cf. id.* § 501.

⁴⁷⁸ *Id.* § 505 cmt. 1.

⁴⁷⁹ T.I.L.A. § 131, 15 U.S.C. § 1641 (2000).

⁴⁸⁰ Four federal circuits agree. See *Ramadan v. Chase Manhattan Corp.*, 229 F.3d 194 (3d Cir. 2000); *Green v. Levis Motors, Inc.*, 179 F.3d 286 (5th Cir. 1999); *Ellis v. Gen. Motors Acceptance Corp.*, 160 F.3d 703 (11th Cir. 1998); *Taylor v. Quality Hyundai, Inc.*, 150 F.3d 689 (7th Cir. 1998). These cases also confirm that an FTC "Holder" Notice in the contract does not "trump" the assignee's protection under the T.I.L.A. § 131.

self-evident in the paperwork, but is fully exposed to liability for any other violations by the assignor that leave no paper trail at all.

5. Sublease

The U.C.L.A. allows a lessor to restrict the subleasing of consumer goods, subject to a good faith standard for withholding its permission.⁴⁸¹ This is a sore spot for the leasing industry and for consumerists as well. From the lease holder's point of view, its property and payment rights are in jeopardy if the original lessee can freely sublease or assign the lease to another person.⁴⁸² Conversely, as the drafters note, "subleasing the goods may be an efficient way for the consumer to adjust to changed circumstances, or to avoid a default."⁴⁸³ U.C.C. Article 2A allows a lessor to prohibit unauthorized subleases and to treat such a sublease as an event of default.⁴⁸⁴ The U.C.L.A. likewise allows the lessor to condition a sublease on the holder's consent (and payment of a reasonable fee).⁴⁸⁵ This condition must be reflected in a "specific and conspicuous provision" in the lease.⁴⁸⁶

For short-term leases (twelve months or less) putting that consent provision in the lease is the only restraint on subleasing. For longer term leases the holder *must* consent to a sublease unless the holder "believes in good faith that the sublease or assignment will jeopardize the holder's rights or increase the holder's risk."⁴⁸⁷ This would probably become a matter of proof only after there has been an unauthorized sublease and the holder seeks return of the goods from the sublessee. If a consumer lessee dickers forthrightly with the holder for consent to a sublease or other relief from the lease, it is likely the parties will work something out. In any case, after a sublease, both the original lessee and the sublessee continue obligated under the lease.⁴⁸⁸

⁴⁸¹ U.C.L.A. § 306.

⁴⁸² There are sublease "brokers" offering consumer lessees the "service" of finding another party to take over the leased goods and the payments. One can imagine a degree of unreliability among such sublease intermediaries and the shoppers they attract. Several states regulate "sublease arrangers" directly. See, e.g., N.C. GEN. STAT. § 20-106.2 (2001); NAT'L CONSUMER L. CTR., TRUTH IN LENDING § 9.2.5, at 537-38 (4th ed. 1999) (concluding that such brokers are also "arrangers" covered by the federal C.L.A.).

⁴⁸³ U.C.L.A. § 306 cmt. 1. They might have added "... and to avoid substantial liability for an early termination."

⁴⁸⁴ U.C.C. § 2A-303(2) (2002). But the provision preserves the lessee's power to alienate its interest by making even a prohibited transfer or sublease "otherwise effective." *Id.*

⁴⁸⁵ U.C.L.A. § 306.

⁴⁸⁶ *Id.* § 306(b). The phrase was based on section 2A-303(7) of the U.C.C.

⁴⁸⁷ *Id.* § 306(b). "Good faith" now includes "observance of reasonable commercial standards of fair dealing," inviting proof of objective benchmarks for approving or disapproving a sublease. *Id.* § 102(a)(4).

⁴⁸⁸ *Id.* § 306(c).

6. Ban on "Gap" Liability

In one of their more decisive policy choices, the U.C.L.A. drafters decided early on to bar the imposition of so-called "gap liability" on consumer lessees. This decision held firm into the final Act,⁴⁸⁹ in the face of some strong industry opposition (which may have become resignation toward the end).

"Gap liability" refers to the risk of physical loss of the leased goods, by accident, theft, or otherwise. Leases, including consumer leases, customarily impose that risk of loss on the lessee, and require the lessee to maintain casualty insurance to cover it. This would be unobjectionable, except that when a leased vehicle is destroyed midway through the lease, the lessee's payoff liability on the forced early termination of the lease will often exceed the insured value of the car. This is because the car usually depreciates faster than the payment stream covers that depreciation, especially in the early months of the lease.⁴⁹⁰ The result is that the lessee has lost the goods (unless the holder is willing to replace them) but still owes a substantial sum representing the "gap" between the adjusted lease balance (what the lessee owes) and the insurance coverage on the goods (the market value of the car).⁴⁹¹ Some lessors internalize the gap risk, *i.e.*, they self-insure or buy insurance on their portfolio of leased goods.⁴⁹² Many other lessors use this risk allocation as an opportunity to offer customers "gap coverage" insurance or "gap waivers" that forgive the gap liability.⁴⁹³ With mark-ups, these gap products can be a significant revenue source for lessors.

Posed simply, the issue is this: Should the parties to a consumer lease be free to allocate the risk of physical loss of the goods by contract, with lessees then free to choose to buy gap coverage or not as their judgments dictate? Or should the law make that risk allocation for the parties by mandating that gap losses be absorbed (or insured) by the professional lessor? The U.C.L.A. opts for the latter approach,⁴⁹⁴ on the theory that it is better to absorb these occasional losses in the overall system than to saddle occasional lessees with substantial (and unexpected) expense if the leased goods are destroyed or stolen.⁴⁹⁵ It is a classic example of prohibiting a consumer risk allocation universally, to protect the few who might be vic-

⁴⁸⁹ *Id.* § 401.

⁴⁹⁰ *Id.* § 401 cmt. 1.

⁴⁹¹ See U.C.L.A. § 401(a) (definition "gap amount").

⁴⁹² *Id.* § 401 cmt. 1.

⁴⁹³ *Id.*

⁴⁹⁴ *Id.* § 401(b) (providing that "a consumer lease may not provide that the lessee is responsible for the gap amount").

⁴⁹⁵ Comments 2 and 3 to U.C.L.A. section 401 elaborate on this rationale.

timized while marginally increasing costs for lessors and prices to consumers.⁴⁹⁶ In this respect the U.C.L.A. is more solicitous for consumers than most of the credit laws that permit charges for voluntary gap protection.⁴⁹⁷

There are qualifications on the otherwise blanket prohibition on imposing gap liability on the consumer lessee. First, the "gap amount" is calculated by treating the loss of the goods as an early termination, and subtracting from the adjusted lease balance whatever cash value is received from the lessee's insurance, or "from any other source" which could be a third-party tortfeasor or that person's insurer.⁴⁹⁸ "Gap amount" also excludes the deductible amount under the lessee's insurance coverage.⁴⁹⁹ And it—logically—excludes any sums otherwise due and payable under the lease at the time of casualty to the goods, such as overdue periodic payments, late charges, or accrued taxes.⁵⁰⁰ Finally, it excludes a reduction in insurance proceeds attributable to (i) the consumer's delinquency in paying the insurance premium, or (ii) the diminished value of the goods before the casualty.⁵⁰¹ The latter would include situations where it is provable that the goods had previously been damaged, were in poor repair, or had excess mileage, all reducing the market value of the goods before the casualty loss. In all of these circumstances, the consumer lessee would be responsible for the sums excluded from the "gap amount."

The second set of qualifications may collectively be called the "moral hazard" limitations. The parties may contract for lessee liability for the gap amount to the extent it is caused by:

- A lapse in required insurance;⁵⁰²
- The lessee's own serious misconduct ("fraud, intentional wrongful act or omission, or gross negligence");⁵⁰³ or

⁴⁹⁶ To the extent lessors can no longer sell marked-up gap-protection products, they lose that revenue opportunity, and must replace it with pricing adjustments elsewhere in the lease, most likely in the basic lease cost or "rent charge" in the lease.

⁴⁹⁷ The basic credit disclosure law, the T.I.L.A., assumes that gap protection products are legitimate and merely specifies how they are to be disclosed in order to be excluded from the finance charge. T.I.L.A. Reg. Z, 12 C.F.R. § 226.4(d)(3) (2002).

⁴⁹⁸ U.C.L.A. § 401(a).

⁴⁹⁹ *Id.*

⁵⁰⁰ *Id.*

⁵⁰¹ *Id.*

⁵⁰² *Id.* § 401(c)(1). If substitute, i.e., force-placed, insurance is in place, it must be applied to reduce the gap amount. *Id.* cmt. 5.

⁵⁰³ *Id.* § 401(c)(2). Comment 5 to that section explains that the holder's claim is in the nature of subrogation against a lessee who "may not avoid gap . . . liability by purposely destroying or 'losing' the goods, or intentionally or by gross negligence allowing their destruction or loss." *Id.* cmt. 5. Simple negligence by the lessee in driving the car, for example, would not fit this exclusion.

- Government forfeiture or confiscation of the goods.⁵⁰⁴

The bottom line on gap liability is that the U.C.L.A. will require that the entire leasing industry conform to the practices of those lessors that have retained the risk of gap losses rather than shift them to consumers. The greater loss to some lessors is the discrete profits to be made from selling gap protection products.

7. *Warranties of Quality*

A consumer lessee's expectations as to the quality and performance of leased goods are governed primarily by the warranty, disclaimer, and remedy provisions of U.C.C. Article 2A.⁵⁰⁵ That is, the U.C.L.A. does not rewrite, extend, or modify those U.C.C. rules at all. Nor does the U.C.L.A. replicate state "lemon laws" applicable to leased goods.⁵⁰⁶

What the U.C.L.A. does do, with respect to warranties, is import an aspect of the federal Magnuson-Moss Warranty Act (M.M.W.A.)⁵⁰⁷ that preserves a supplier's implied warranties whenever that supplier makes a "written warranty" on the goods that are leased.⁵⁰⁸ The operative language in U.C.L.A. § 310, patterned on M.M.W.A., is:

A supplier may not disclaim or . . . modify an implied warranty to a lessee with respect to leased goods if:

- (1) the supplier makes a written warranty to the lessee with respect to the leased goods; or
- (2) at the time the lessee signs the lease, or within 90 days thereafter, the supplier enters into a service

⁵⁰⁴ *Id.* § 401(c)(3). Government seizure of the goods is possible if the goods are involved in unlawful activity such as drug trafficking.

⁵⁰⁵ The relevant U.C.C. Article 2A provisions are section 2A-210 ("Express warranties"); section 2A-211 ("Warranties against interference and infringement"); section 2A-212 ("Implied warranty of merchantability"); section 2A-213 ("Implied warranty of fitness for particular purpose"); section 2A-214 ("Exclusion or modification of warranties"); and section 2A-503 ("Modification or impairment of rights and remedies"). If the pending revisions of U.C.C. Articles 2 and 2A are finalized, consumer lessees will benefit from provisions extending warranty responsibilities to remote suppliers and advertisers, U.C.C. §§ 2-313A, 2-313B (2002), and more explicit disclaimer language in consumer leases in amended U.C.C. § 2A-214.

⁵⁰⁶ The drafters include a legislative note that urges states to extend existing lemon laws to leased goods if they do not already do so. U.C.L.A. § 310 legis. n.2.

⁵⁰⁷ 15 U.S.C. §§ 2301-2312 (2000); see *supra* notes 149-62 and accompanying text for a discussion of the M.M.W.A.

⁵⁰⁸ As discussed earlier, there is significant case law to the effect that M.M.W.A. does not apply to leases. See *supra* text accompanying notes 155-61. Perhaps Congress ought to rectify this limitation on M.M.W.A. coverage. The Drafting Committee thought it unfeasible to attempt to rewrite the entire federal M.M.W.A., including its disclosure, labeling and remedies rules, into this state-law uniform act for leases. Instead it focused on the major substantive provision of M.M.W.A., preserving implied warranties.

contract with the lessee with respect to the leased goods.⁵⁰⁹

The principal effect of this inclusion in the U.C.L.A. will be on remote suppliers, particularly manufacturers that include written warranties destined for the consumer end-user of the product, and on retail dealers that make written warranties⁵¹⁰ or sell service contracts. Any of these suppliers⁵¹¹ will also be bound by the implied warranty of merchantability and perhaps by the implied warranty of fitness as well, regardless of any attempted disclaimer of those warranties.⁵¹² But, as in M.M.W.A., a supplier may limit the duration of the implied warranties to that of the written warranty (except where the written warranty would be a "full" warranty under M.M.W.A.).⁵¹³

Aside from M.M.W.A. and the U.C.L.A., some states have acted to prohibit altogether, or substantially restrict, disclaimers of implied warranties in sales of goods.⁵¹⁴ The U.C.L.A. drafters alert those states to amend their disclaimer prohibitions to make them applicable to leases as well as sales.⁵¹⁵ Connecticut is one of those states,⁵¹⁶ and in its enactment of the U.C.L.A. it specifically adds language that nullifies all disclaimers of implied warranties.⁵¹⁷ The inclusion of this non-uniform provision may create some redundancy with the U.C.L.A., but no real clash. The U.C.L.A. preserves implied warranties where a "supplier" makes a "written warranty," and this has particular impact on manufacturer warranties that run with the goods.⁵¹⁸ The added Connecticut provision, on the other hand, outlaws "a term in a consumer lease" that purports to disclaim implied warranties; this

⁵⁰⁹ U.C.L.A. § 310(b); cf. M.M.W.A. § 108(a), 15 U.S.C. § 2308(a).

⁵¹⁰ Retail dealers typically pass along the manufacturer's warranty and agree to perform warranty work on the warrantor's behalf, but make no express warranties of their own. Nothing in M.M.W.A. or in the U.C.L.A. requires any supplier or dealer to make any particular warranty. Cf. M.M.W.A. § 102(b)(2), 15 U.S.C. § 2302(b)(2); *id.* § 107, 15 U.S.C. § 2307 (stating that warrantor may designate representatives to perform warranty work).

⁵¹¹ The term is defined broadly to include any upstream supplier, from manufacturer through distributor to the retail lessor. U.C.L.A. § 310(a)(3), cmt. 3.

⁵¹² Neither the U.C.L.A. nor M.M.W.A. necessarily extend the implied warranties to remote customers such as consumer buyers or lessees if state law requires privity of contract between warrantor and recipient. Compare *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595, 605 (S.D.N.Y. 1982) (stating that "if state law requires vertical privity to enforce an implied warranty and there is none, then, like the yeastless soufflé, the warranty does not 'arise'"), with *Szajna v. Gen. Motors Corp.*, 503 N.E. 2d 760, 769-70 (Ill. 1986) (holding that M.M.W.A. not only preserves a supplier's implied warranties but extends them to the consumer buyer without regard to vertical privity).

⁵¹³ U.C.L.A. § 310(c).

⁵¹⁴ This has sometimes been by non-uniform amendment of U.C.C. section 2-316 which would otherwise permit such disclaimers.

⁵¹⁵ U.C.L.A. § 310 legis. n.l.

⁵¹⁶ CONN. GEN. STAT. § 42a-2-316(5) (2001).

⁵¹⁷ CONN. U.C.L.A. § 27(e), 2002 Conn. Pub. Acts 02-81 (Reg. Sess.).

⁵¹⁸ U.C.L.A. § 310(b)(1).

appears applicable only to the retail lessor, who previously could pass along the factory warranty but disclaim warranties of its own.⁵¹⁹ Now the retail lessor will be on the hook for implied warranty breaches of its own. While the manufacturer's warranty may be the realistic source of a consumer's remedy, the dealer's implied warranties give the consumer extra leverage, both in the repair shop and in court.⁵²⁰

The non-uniform Connecticut amendment to the U.C.L.A. also nullifies any attempt, in the lease, to "exclude or modify a remedy for breach of such warranties."⁵²¹ Thus lease language attempting to limit remedies to repair-or-replacement, or to avoid consequential damages, is not enforceable.

8. *Choice of Law and Forum*

Historically, creditors could create strategic advantages for themselves by specifying in the contract that the agreement was governed by the law of a jurisdiction favorable to the creditor. The U.C.L.A.'s treatment of choice of law clauses is discussed above⁵²² and needs no restating, except to say it prevents that abuse. But a related technique for creditors, and now lessors or lease holders, to gain procedural and tactical advantage is to specify in the lease a designated forum for suits against the lessee, or suits by the lessee, or both.

A common practice was to provide that the consumer agreed to be sued in the creditor's home state—often far from the consumer's residence. A lease might assume that suit would be brought in the consumer's home state, but permit it in any venue within that state, so that, for example, a San Diego resident might have to defend a collection action 500 miles away in San Francisco.⁵²³ A parallel practice was to specify in the consumer contract that the consumer could bring an action *against* the merchant only in the jurisdiction of the merchant's headquarters—likely many

⁵¹⁹ CONN. U.C.L.A. § 27(e), 2002 Conn. Pub. Acts 02-81 (Reg. Sess.).

⁵²⁰ Much of the litigation value of the dealer's implied warranties is that a breach of warranty is a "claim or defense" that can be asserted against an assignee of the lease, either for affirmative recovery, or as a setoff or defense to collection action. See *supra* text accompanying notes 466-80 for a discussion of assignee liability. By contrast, a breach of the manufacturer's warranty is generally considered actionable only against the manufacturer itself, and not against the dealer or dealer's assignee. But see *Mercedes-Benz Credit Corp. v. Lotito*, 703 A.2d 288 (N.J. Super. 1997), *rev'd in part on other grounds*, 746 A.2d 480 (N.J. Super 2000) (holding that after a Mercedes vehicle carrying a factory warranty was leased to a consumer by an authorized Mercedes dealer and financed by the manufacturer's captive finance company the lessee could assert warranty claims based on the factory warranty against the affiliated finance company). If, as the Mercedes-Benz court intimates but does not clarify, this was a "finance lease," the result seems consistent with Comment 2 of section 2A-407 of the U.C.C.

⁵²¹ CONN. U.C.L.A. § 27(e), 2002 Pub. Acts No. 02-81 (Reg. Sess.).

⁵²² See discussion *supra* Part IV.B.4.

⁵²³ This "inconvenient forum" device has been widely outlawed. See, e.g., U.C.C.C. § 5.113 (2002).

miles from the consumer's residence. Although the idea of a binding contractual choice of forum has been found constitutional on due process grounds,⁵²⁴ the use of that practice to force consumers to sue in distant jurisdictions remains objectionable on basic fairness grounds.

The U.C.L.A. deals forthrightly with each type of forum selection clause.⁵²⁵ Actions against a consumer lessee can be brought only in the venue of the lessee's residence, and actions by a lessee against the lease holder may be brought in "any judicial forum that otherwise has jurisdiction over the holder."⁵²⁶ Lease language to the contrary is unenforceable.

VII. THE CRITICAL JUNCTURE: DEFAULT AND LEASE TERMINATION

The most difficult issues involving consumer leases, like credit transactions, seem to swirl around default and termination. The U.C.L.A. devotes considerable attention to this area.

A. *Who Bears the Costs of Late Payments and Other Defaults?*

A lessor will virtually always want the delinquent lessee to be responsible for costs and charges related to delinquency. The U.C.L.A. generally approves the contractual allocation of these costs to the lessee, but subject to a number of restraints.

1. *Late Charges*

The Act permits the lease to set late charges for payments that are ten or more days in arrears, in an amount up to the greater of ten dollars or five percent of the tardy payment.⁵²⁷ The holder may not "pyramid" late charges, i.e., impose a late charge on a subsequent payment that lacks only the amount of an earlier-imposed late charge.⁵²⁸ In effect, the consumer can be charged a late fee only once for a payment that is actually made but late.⁵²⁹ If the late installment remains unpaid however, additional late

⁵²⁴ See, e.g., *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991) (upholding a Florida forum-selection clause against residents of Washington); *Nat'l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 318 (1964) (holding that service of process on respondents' agent in New York, pursuant to lease agreement, satisfied due process requirements, even though respondents were residents of Michigan).

⁵²⁵ U.C.L.A. § 108(c)-(d) (2002).

⁵²⁶ *Id.* § 108(d). Thus, merchants doing business nationwide or regionally are likely subject to suit by the lessee in any state where they are doing business, including the state of the lessee's residence.

⁵²⁷ *Id.* § 304(a).

⁵²⁸ *Id.* § 304(b).

⁵²⁹ While this protects the consumer from multiple charges for the same delinquency, it also makes it difficult for the holder to enforce payment of the late charge since subsequent timely payments are credited first to the current payment due, then to delinquent scheduled payments, and only then to

charges may be imposed in subsequent periods.

The U.C.L.A. provisions on late charges are meant as bright-line authorizations, and inherently reasonable as such. While the federal regulation says merely that late charges must be "reasonable,"⁵³⁰ the U.C.L.A. is setting specific dollar limits which the drafters considered appropriate and should be considered *per se* reasonable.⁵³¹

2. Default and Collection Charges

Like the federal C.L.A., the U.C.L.A. permits imposition on the consumer lessee of charges for any delinquency or default, "including collection, repossession, and court costs."⁵³² Like the federal act, these charges are limited to an amount that is "reasonable" as a form of liquidated damages.⁵³³ Since these expenses are in the nature of incidental damages for breach of the lease,⁵³⁴ a reasonable amount or formula for liquidating them should approximate the out of pocket costs actually or likely to be incurred.

late or other charges. *Id.* § 304 cmt. 4. It is doubtful a holder would repossess and foreclose an otherwise current lease on account of an unpaid \$20 late charge. *Id.*

⁵³⁰ 12 C.F.R. § 213.4(q) (2002).

⁵³¹ One court has held that late charges are not subject to the explicit reasonableness test under the C.L.A. *Deusner v. Firststar Corp.*, 186 F. Supp. 2d 766, 769 (W.D. Ky. 2001). The statute lumps together charges for "delinquency, default, or early termination," and says any such charge must be "reasonable." 15 U.S.C. § 1667b(b) (2000). Separately it requires disclosure of any charge for "delinquency, default, late payment, or early termination." *Id.* § 1667a(11) (emphasis added). Noting the omission of late charges from the first phrase, the court concluded that late charges are excused from the reasonableness standard. *Deusner*, 186 F. Supp. 2d at 767. But aren't late charges imposed for a "delinquency" or "default"? Either the court is wrong, or the Federal Reserve Board is.

⁵³² U.C.L.A. § 304(c).

⁵³³ The U.C.L.A. tests reasonableness "in light of the anticipated or actual harm caused by the delinquency or default, the difficulties of proof of loss, and the inconvenience or infeasibility of otherwise obtaining an adequate remedy." *Id.* This language is taken from 15 U.S.C. § 1667b(b), which in turn was taken from U.C.C. § 2-718 (2002), the liquidated damages provision for sales of goods. Since enactment of the federal C.L.A. in 1976, Article 2A has been added to the U.C.C., with its own, somewhat differently phrased, liquidated damages rule. (Had there been a U.C.C. Article 2A in 1976, Congress would probably have used its liquidated damages language instead of Article 2.) The U.C.L.A. drafters chose to follow the C.L.A. and U.C.C. Article 2 so that there would not be differing standards of reasonableness under federal and state law. Moreover, the liquidated damages formula in Article 2A omits the "difficulties of proof of loss" and "inconvenience or infeasibility" factors for assessing reasonableness, intentionally making the test *less* restrictive than that in Article 2, to emphasize the freedom of contract policy for leases. U.C.C. § 2A-504. To the extent the Article 2A formula is less consumer-friendly, it could be found inconsistent with and preempted by the federal C.L.A. On the other hand, consumer lawyers have argued that the Article 2A standard may be *more* protective of consumers because it omits reference to "actual harm" and does not allow a liquidated damages provision to be justified by hindsight. NAT'L CONSUMER L. CTR., TRUTH IN LENDING § 9.5.2.1, at 573-74 (4th ed. 1999). In reality these distinctions may be moot, because the U.C.L.A. drafters indicate in Comment 1 to section 304 that default charges that are impermissible under Article 2A "are not reasonable under this Act either." U.C.L.A. § 304 cmt. 1.

⁵³⁴ *Cf.* U.C.C. § 2A-530 (detailing the types of incidental damages incurred by lessor).

Formulas that set default charges as a percentage of the balance owed may be suspect for that reason.⁵³⁵ Default charges must be provided for in the lease,⁵³⁶ and disclosed pursuant to federal regulations.⁵³⁷

Default charges may include the holder's attorney's fee expense, but only for work done by non-employee attorneys.⁵³⁸ If the lease provides for the holder's recovery of attorney's fees, the Act automatically gives reciprocal attorney's fees to a consumer who successfully defends a collection action.⁵³⁹

B. *Default, Repossession, Disposition: When and How?*

Eventually some lessees will default and the lease holder will want to exercise its "ownership" rights to repossess the leased goods. The U.C.L.A. boundaries at this stage are largely familiar ones from the credit arena.

1. *Events of Default*

Regardless of default-clause language in the lease, the lease holder can act on that clause only as permitted by the Act. One permitted circumstance is when the lessee fails to make a payment when due.⁵⁴⁰ Otherwise, the holder must be prepared to establish that "the prospect of payment, performance, or realization of the holder's interest in the goods is significantly impaired."⁵⁴¹ The U.C.L.A. language on these points is virtually identical to that in the U.C.C.C., and the U.C.L.A. Comment fleshes out examples of various kinds of non-payment defaults.⁵⁴² While the holder has the burden to prove the necessary "significant impairment," the drafters indicate⁵⁴³ that the holder need not get a judicial determination in advance, and can act on such a breach immediately. The holder's burden of proof will surface if and when the lessee challenges the holder's right to declare a default.

2. *Lessee's Right to Cure*

Where the lessee's default is a failure to pay money, the holder may not proceed with repossession or judicial collection without giving the les-

⁵³⁵ U.C.L.A. § 304 cmt. 2 (stating that "a collection fee of 25% of the adjusted lease balance may not be reasonable if default occurs early in the lease and the charge would far exceed the actual costs of collection").

⁵³⁶ *Id.* § 304 cmt. 1.

⁵³⁷ 12 C.F.R. § 213.4(q) (2002).

⁵³⁸ U.C.L.A. § 304(d).

⁵³⁹ *Id.*; see also *id.* § 304 cmt. 5.

⁵⁴⁰ *Id.* § 402(a)(1).

⁵⁴¹ *Id.* § 402(a)(2).

⁵⁴² *Id.* § 402 cmt. 1.

⁵⁴³ *Id.* § 402 cmt. 1.

see a chance to "cure"⁵⁴⁴ the default and restore the parties' rights, "as if the default had not occurred."⁵⁴⁵ Again, this mechanism is patterned closely on the U.C.C.C.⁵⁴⁶ Before repossession or suit, the holder must notify the lessee that the lessee has twenty or more days to cure the default by bringing the account fully current⁵⁴⁷ (but without any additional security deposit or prepayment).⁵⁴⁸ Only if the lessee fails to cure may the holder proceed with foreclosure or suit.⁵⁴⁹ A consumer has the right to cure only once each twelve months,⁵⁵⁰ and so cannot use it as a routine response to non-payment.

There may be less theoretical justification for a right to cure in the lease setting because the lessee has no equity interest or ownership investment to protect—the goods are owned by the holder of the lease. Holders can always work out alternative or modified payment arrangements with their delinquent customers (including subleases), and will often find it in their self-interest to do so. Still there is a fairness value in legislating a mandatory cure notice and waiting period, to avoid premature, mistaken, or "surprise" foreclosures that may invite a breach of the peace. It is doubtful the formal cure mechanism is used very often,⁵⁵¹ but its availability can have a prophylactic effect against potentially nasty or precipitous foreclosures.

3. *Repossession*

As owner of the leased goods, the holder is entitled to repossess them on the lessee's default, or after the lessee has failed to cure.⁵⁵² Many repossessions, we can assume, involve peaceful, voluntary surrender of the goods by a lessee who realizes full well that he is in default and that there is no particular advantage in resisting repossession. Absent such a voluntary surrender, the holder may proceed either "by judicial process or by self-help without a breach of the peace."⁵⁵³ The latter phrase echoes the traditional standard for self-help repossession in U.C.C. Article 9,⁵⁵⁴ and more recently in U.C.C. Article 2A.⁵⁵⁵ The U.C.L.A. drafters clearly in-

⁵⁴⁴ *Id.* § 402(b)–(e).

⁵⁴⁵ *Id.* § 402(d).

⁵⁴⁶ *Cf.* U.C.C.C. §§ 5.110–5.111 (2002) (notice requirements and the consumer's right to cure).

⁵⁴⁷ U.C.L.A. § 402(c).

⁵⁴⁸ *Id.* § 402(d).

⁵⁴⁹ *Id.* § 402(b).

⁵⁵⁰ *Id.* § 402(e).

⁵⁵¹ If there is any empirical evidence on consumer exercise of cure rights, this author has not seen it.

⁵⁵² U.C.L.A. § 403 cmt. 1.

⁵⁵³ *Id.* § 403(a).

⁵⁵⁴ U.C.C. § 9-609(b)(2) (2002).

⁵⁵⁵ *Id.* § 2A-525(3).

tend the U.C.L.A. rule "to be interpreted consistently with" the U.C.C.⁵⁵⁶ Thus there is a ready-made body of case law guidance in every state for determining the permissible bounds of self-help repossession,⁵⁵⁷ and little more need be said about it.

Some things must be said, however, about an issue that surfaced in the U.C.L.A. drafting process, and drew an extensive non-uniform provision in the Connecticut version of the U.C.L.A. (and also in the version of U.C.C. Article 2A adopted in that state)—that is "electronic self-help," and it refers primarily to emergent technological devices that may be programmed to control the starter system of a motor vehicle. If the lessee or credit buyer does not make payments when due, the device immobilizes the car. Current examples of this technology are used mostly in subprime auto markets. Each month when the customer makes the monthly payment, she is given a code to be entered in the device installed in the car to allow it to run for the next month. No pay, no code, no ride! One can imagine more sophisticated versions where the holder can transmit authorizations or shut-down messages remotely as through satellite navigation systems. Comparable "electronic self-help" mechanisms exist with respect to purchased or leased computers, where on default or breach the customer is denied access to computer software and programming.⁵⁵⁸

The open policy question is whether electronic self-help is a good thing or whether it is so fraught with risks and dangers that it ought not be permitted. Industry supporters argue that the technique is an efficient, low cost way to incent customers to pay on time and to help assure that the vehicle can be located if the customer defaults. One might also think that electronic self-help could reduce instances of midnight confrontations between angry consumers and the "repo man." Consumerists worry primarily about the safety implications. Can the device malfunction, and shut off the ignition while the car is on the highway? What if the customer makes a timely payment but the new code does not work? What if the consumer's payment is a bit overdue, but the consumer has to use the car in an emergency, or needs it simply to get to the holder's place of business to make the late payment? To which the industry responds that the "starter interrupt" mechanism cannot shut off the ignition once started, and that customers are given special codes for one or several extra starts precisely for emergency situations.

This is an issue that will obviously evolve with time. The U.C.L.A.

⁵⁵⁶ U.C.L.A. § 403 cmt. 1.

⁵⁵⁷ See NAT'L CONSUMER L. CTR., REPOSSESSIONS AND FORECLOSURES §§ 6.1-6.6, at 191-209 (4th ed. 1999) (summarizing the doctrine of self-help repossession among the states); cf. JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 25-7 (5th ed. 2000)

⁵⁵⁸ Cf. U.C.I.T.A. § 816 (2002) (limitations on electronic self-help); Robbin Rahman, Comment, *Electronic Self-Help Repossession and You: A Computer Software Vendor's Guide to Staying Out of Jail*, 48 EMORY L.J. 1477 (1999) (advocating the use of electronic self-help by vendors).

temporizes on it by setting out a bracketed provision (optional for the states) that flatly prohibits electronic self-help.⁵⁵⁹ An accompanying Legislative Note explains that electronic self-help is new, and "issues of propriety, safety, and reliability can be identified but are not fully resolved."⁵⁶⁰ The Note suggests that a state might either enact the prohibition for now and revisit the matter in the future, or omit any mention of electronic self-help and monitor practices as they develop.

Connecticut chose neither of these alternatives. Instead it addresses electronic self-help head on.⁵⁶¹ The provision raises many questions of implementation and compliance, and will likely chill industry enthusiasm for electronic repossession techniques. The fifteen-day notice requirement may helpfully encourage lessees to pay up, or it may encourage them and the goods to become hard to find.⁵⁶² The subsection as a whole is patterned closely on the 1999 version of section 816 of the Uniform Computer Information Transactions Act ("U.C.I.T.A."), which may explain some of the dire fears in paragraph (5) of the Connecticut provision⁵⁶³—that electronic

⁵⁵⁹ U.C.L.A. § 403(d).

⁵⁶⁰ *Id.* § 403 legis. note.

⁵⁶¹ CONN. U.C.L.A. § 30(d), 2002 Pub. Acts No. 02-81 (Reg. Sess.). The statute provides for the following:

(d)(1) In this subsection, "electronic self help" means the use of electronic means to exercise a holder's rights pursuant to subsection (a) of this section and "electronic" means relating to technology that has electrical, digital, magnetic or wireless optical electromagnetic properties or similar capabilities. "Electronic self help" includes the use of electronic means to locate the goods.

(2) Electronic self help is permitted only if the lessee separately agrees to a term of the lease authorizing electronic self help that requires notice of exercise as provided in subdivision (3) of this subsection.

(3) Before resorting to electronic self help authorized by a term of the lease, the holder shall give notice to the lessee stating:

(A) That the holder intends to resort to electronic self help as a remedy on or after fifteen days following communication of the notice to the lessee;

(B) The nature of the claimed breach that entitled the holder to resort to self help; and

(C) The name, title, address and telephone number of a person representing the holder with whom the lessee may communicate concerning the goods.

(4) A lessee may recover direct and incidental damages caused by wrongful use of electronic self help. The lessee may also recover consequential damages for wrongful use of electronic self help even if such damages are excluded by the terms of the lease.

(5) Even if the holder complies with subdivisions (2) and (3) of this subsection, electronic self help may not be used if the holder has reason to know that its use will result in substantial injury or harm to the public health or safety or grave harm to the public interest substantially affecting third parties not involved in the dispute.

Id.

⁵⁶² May the electronic self-help notice be combined with the "cure" notice under U.C.L.A. section 402? There seems no obvious reason why this could not be done. Otherwise the holder would need to send the cure notice, wait at least twenty days, and, if the lessee has not cured by that time, then send another fifteen-day notice for electronic self-help.

⁵⁶³ Compare CONN. U.C.L.A. § 30(d)(5) (2002) ("Even if the licensor complies. . ."), with U.C.I.T.A. § 816(f) (2002) ("Even if the holder complies. . .").

shut-down of major computer systems or networks could affect public health, safety or security. (It seems doubtful that shutting down an automobile's starter system could have such public impact.). The Connecticut Act's parallelism to U.C.I.T.A. is interesting because it tracks that Act as of its original promulgation in 1999. That version of U.C.I.T.A. would permit a form of electronic self-help with respect to more commercial, probably customized, software licenses, but flatly bans electronic self-help in "mass market"—i.e., largely retail or consumer level—transactions.⁵⁶⁴ U.C.I.T.A. was revised in 2002 to ban electronic self-help across the board.⁵⁶⁵

The U.C.L.A. (and U.C.I.T.A.) have fired the first shots across the bow of electronic self help. We can expect more skirmishes in this area.

4. *Disposition of Goods; Application of Proceeds*

Once the leased goods are back in the holder's hands following default, what becomes of them and the lessee's remaining obligations under the lease? Sometimes the goods may go right back on the dealer's shelf, ready to be leased again to another customer. The high-school musician's tuba may be of this sort. Far more generally in the case of consumer goods, there is no re-lease market for used goods in various states of disrepair, and the holder will look to dispose of them, usually by sale. The sale or other disposition will determine a "realized value" for the goods, and that value will be credited against the lessee's remaining obligations. Like U.C.C. Article 9, the U.C.L.A. specifies the order in which those proceeds are applied.⁵⁶⁶ The lessee is liable for any deficiency.⁵⁶⁷

The challenge is to give the holder some practical leeway in determining realized value, while also assuring that the consumer gets fair credit for the value of the leased goods being returned. The U.C.L.A. provides four options for measuring realized value:⁵⁶⁸

1. The price received on sale of the goods;⁵⁶⁹

⁵⁶⁴ U.C.I.T.A. § 816(b) (2002).

⁵⁶⁵ *Id.*. The new subsection says simply: "On cancellation of a license, electronic self-help is not permitted. . ." *Id.*

⁵⁶⁶ U.C.L.A. § 403(b) (2002). The lease may specify the order of application, and that will control. *Id.* Absent such a provision in the lease, the realized value goes first to default and collection charges, next to obligations that are due or past due under the lease, and then to any early-termination liability of the lessee. *Id.*

⁵⁶⁷ *Id.* § 403(c). Unlike U.C.C. Article 9, the holder has no obligation to account for any surplus, since the lessee has no ownership interest or equity in the goods. Any surplus is part of the residual value that reverts to the holder. *Id.*

⁵⁶⁸ The sum includes any incidental rebates of insurance premiums or service contracts that the holder receives. *Id.* § 404(a)(1).

⁵⁶⁹ *Id.* § 404(a)(2)(A).

2. The present value of a re-lease of the goods;⁵⁷⁰
3. If the goods are not sold or re-leased, the higher of the best offer for the goods or their "fair market value";⁵⁷¹ or
4. As an alternative to the above options, the parties may simply agree on a realized value (subject to safeguards against manipulation).⁵⁷²

Where the holder disposes of the goods by sale, the Act imports the familiar standards from U.C.C. Article 9 (not found in Article 2A) that the sale may be public or private and that every aspect of it must be "commercially reasonable."⁵⁷³ The Act also stipulates that sale "in a wholesale market is not unreasonable,"⁵⁷⁴ hopefully mooted debate about whether the lessee is entitled to a *retail* market valuation. Leased vehicles especially are almost always liquidated at wholesale auctions, and it is unrealistic to think that the repossessing holder, typically a financial institution, will maintain a retail used car lot for disposition of vehicles coming off lease. At the same time, the holder may have arrangements to sell the repossessed goods back to the originating dealer, who may in fact resell them at retail on its used car lot. In this kind of insider sale, the repurchase price paid to the holder by the dealer may still be used to measure realized value so long as it is "not less than the fair market value of the goods."⁵⁷⁵

There is a final nugget in the U.C.L.A. to discourage holders from trying to low-ball realized values. If the disposition is not commercially reasonable, then realized value is set at *retail* market value. (For used cars this would probably mean about a twenty to thirty percent up-tick in realized value, as against wholesale.) This is acknowledged to be a "sanction" for misbehavior, but also to serve as an alternative to application of an "ab-

⁵⁷⁰ *Id.* § 404(a)(2)(B). That is, "the total of periodic payments plus the residual value under the new leased, reduced to present value." *Id.*

⁵⁷¹ *Id.* § 404(a)(2)(C).

⁵⁷² *Id.* § 404(b). The agreement on realized value must be made at the time of lease termination, not as boilerplate in the lease itself, but the lease may specify a method or formula for determining it. *Id.* The agreed-upon amount may not be "unreasonable," and is not if it is determined by a mutually agreeable appraiser or by reference to a standard valuation source, like used car "blue books." *Id.*; cf. U.C.C. § 9-620 (2002) (requirements for acceptance of collateral in full or partial satisfaction of obligation); *id.* § 9-621 (notification of proposal to accept collateral). This is roughly comparable to "strict foreclosure" under U.C.C. sections 9-620, 9-621.

⁵⁷³ U.C.L.A. § 404(c).

⁵⁷⁴ *Id.*

⁵⁷⁵ *Id.* § 404(d). This limitation applies when the disposition is "to a person related to the holder, or a person obligated to the holder under an agreement for recourse, repurchase, or the like." *Id.* The phrase "person related to" is used as defined in U.C.C. section 9-102(a)(63). U.C.L.A. § 404 cmt. 6.

solute bar" rule that would forfeit the holder's entire deficiency recovery.⁵⁷⁶

C. Early Termination Liability

If there is a single aspect of consumer leasing that was the "heart of the matter" for the U.C.L.A. drafters and observers, it was the issue of "reasonable" early termination formulas. The background of the issue has been discussed earlier in this article.⁵⁷⁷ In brief, the federal C.L.A. requires that charges for early termination—like default charges generally—be "reasonable" as a form of liquidated damages.⁵⁷⁸ Reasonableness is measured in "light of the anticipated or actual harm caused by the . . . early termination, the difficulties of proof of loss, and the inconvenience or unfeasibility of otherwise obtaining an adequate remedy."⁵⁷⁹ Early termination liability includes situations where the lessee has defaulted⁵⁸⁰ and the holder has repossessed and foreclosed. It also includes, especially for vehicle leases, a voluntary termination by the lessee, i.e., a termination acceded to by the holder on payment of the specified charge.⁵⁸¹

The U.C.L.A. Drafting Committee early on decided to replicate in the Act the general federal standard, in the interest of consistency of the rule and to avoid a possible clash with the federal rule. The issue for the drafters was whether they could refine the reasonableness standard so as to give consumers more precise protection and to provide a safe-harbor rule for the leasing industry. Despite strenuous effort, the Act does not advance the ball very far toward this goal.

The issue may not be a critical one outside of motor vehicle leasing.⁵⁸² For the vehicle leasing industry, the formula for early termination liability goes to the heart of lessors' pricing structures, as it determines how much of the unpaid lease obligation will be recouped when a lease ends early. From the consumer side, certain industry formulas for early termination charges represent sometimes wildly lopsided recoveries when set against the lessor's economic expectancy under the lease. If a typical closed-end lease runs to full term, the consumer merely surrenders the goods and has no further liability under the lease. If the goods at that point are worth less than their projected residual value, the holder eats (or insures against) that

⁵⁷⁶ *Id.* § 404 cmt. 7; *cf.* U.C.C. 9-626(b) (2002) (permitting courts to use their own established rules for dealing with a consumer transaction in which the deficiency or surplus is in issue); *id.* § 404 cmt. 4.

⁵⁷⁷ *See supra* notes 77-82.

⁵⁷⁸ 15 U.S.C. § 1667b(b) (2000).

⁵⁷⁹ *Id.*

⁵⁸⁰ *Id.*

⁵⁸¹ *Id.* § 1667b(a).

⁵⁸² All of the reported C.L.A. litigation on early termination charges involves vehicle leases. *See* NAT'L CONSUMER L. CTR., TRUTH IN LENDING § 9.3.6.8, at 556-61 (4th ed. 1999) (discussing early termination and default charges).

loss. Prevailing practice usually includes in the lease an early termination formula that, in one variation or another, allows the holder to recover the entire remaining lease balance (including the estimated residual value), with adjustments for unearned interest and similar time-related charges, and with a deduction from that sum of the actual realized value of the goods at the time of early termination. Since the goods typically depreciate faster than the lessee's payments account for depreciation, a lessee may find herself owing a substantial early termination charge in order to make up the difference. *Miller v. Nissan Motors Acceptance Corp.*⁵⁸³ is the poster-child case. One of the plaintiff lessees (Miller) terminated his lease one month before its scheduled expiration, triggering the "ET" formula in the lease.⁵⁸⁴ As ET provisions go, this is not bad. It is reasonably clear and succinct; it "present values" the future obligations under the lease, including the residual value, and it uses the mainstream "constant yield method."⁵⁸⁵ What it does not tell you is whether the residual value figure set in the lease is realistic or not. Using the adjusted lease balance as the base and subtracting the salvage value of the car would have required an early termination payment of \$5,336.95.⁵⁸⁶ Instead, the holder graciously allowed the lessee to terminate on payment of the remaining single monthly payment of \$267.⁵⁸⁷ The other plaintiffs (the Roses) terminated their lease two months early; the contractual ET charge would have been \$2,282.28, but they were allowed to terminate for the price of the two remaining monthly payments, about \$480.⁵⁸⁸

Taking these numbers at face value, the holder of the Miller lease had to absorb a residual loss of more than \$5,000 on this transaction,⁵⁸⁹ i.e., it

⁵⁸³ No. CIV.A.99-4953, 2000 WL 1599244, at *1 (E.D. Pa. Oct. 27, 2000).

⁵⁸⁴ The Early Termination clause in the *Miller* case read as follows:

Early Termination Liability: At any time after 12 monthly payments have been paid, I [the lessee] may terminate this lease on the due date of a monthly lease payment if this lease is not in default . . . and I have given you [NMAC] 30 days written notice. . . . [I]f I terminate early, . . . I must pay you an Early Termination Charge which is determined as follows: First, all monthly lease payments, which under the terms of this lease are not yet due and the residual value of the Vehicle are discounted to present value by the Constant Yield Method at the rate implicit in this lease (the "Adjusted Lease Balance"). This amount is then reduced by the Realized Value (and insurance loss proceeds) which you receive for the Vehicle. The balance due you is the Early Termination Charge which I will pay to you immediately. If there is an excess, however, you will not refund it to me.

Id.

⁵⁸⁵ *Id.*

⁵⁸⁶ *Id.* at *29. The court's opinion does not set out the precise mathematical derivation of this total, citing only to an affidavit in the record. *Id.* But as the court otherwise determines, the "residual value" figure used in the lease was substantially inflated for marketing purposes, and we can guess that the vehicle had a weak realized value. *Id.* at *29-*30. The gap between these two numbers is the basic early termination charge.

⁵⁸⁷ *Id.* at *30.

⁵⁸⁸ *Id.* at *2.

⁵⁸⁹ *Id.* at *29.

received \$267, but needed \$5,300 to recover its full unamortized investment in the vehicle. On the Roses' lease, the holder's residual loss was about \$1,800. Small wonder that lessors write ET formulas as they do. For the thirty-or-so percent of leases that terminate early, the holder by contract has shifted the whole residual value risk to the customer.⁵⁹⁰ These leases are "closed-end" (the consumer has no further liability on surrender of the goods at lease expiration) only when the lease runs to term. At any earlier point the leases are "open-end" in the sense that the lessee bears the residual value risk on early termination.

The court in *Miller* assessed the reasonableness of the contractual ET charges⁵⁹¹ as follows:

[T]he letter of the statute [C.L.A.], as well as pertinent interpretive materials, show that the early termination charge must be a reasonable approximation of the harm—either the actual harm or the harm anticipated at the time the agreement was drafted—accruing to the lessor from the lessee's early termination. Putting aside for the moment the sheer dollar amounts, we find that a charge of over \$2,000 to the Roses could not be reasonable where, had they held the car to term, the further lease payments to NMAC would have totaled less than \$500. . . . [T]here is nothing in the record that would remotely suggest that NMAC suffered anything near \$2,000 in damages from the early termination. Similarly, there is nothing to show that the over \$2,000 charge would have been reasonable in light of any anticipated damages at the outset of the lease. This logic also applies to the [contract ET] amount calculated for Miller.⁵⁹²

So the amounts generated by the ET formula in this case were excessive and unreasonable.⁵⁹³ The court then continued, with a paragraph that

⁵⁹⁰ An industry-sponsored study captures the point:

In 2002, 69% of units coming off lease reached full term, which is relatively the same year over year ['02 vs '01] . . . A higher percentage of leases reaching full term is not good for lessors since many of these leases are returned for lessor disposal. As a result, the lessor is forced to bear the residual value risk and its potential impact to financial performance since the market value of the vehicle oftentimes is lower than the original residual value.

CONSUMER BANKERS ASS'N, 2002 AUTOMOBILE FINANCE STUDY, at V.14 (2002).

⁵⁹¹ As noted, NMAC had a policy of charging the lesser of the contractual ET charge or the remaining monthly payments. *Miller*, 2000 WL 1599244, at *7. Although the holder did not actually impose the contractual formula, the court found that its reasonableness was still in issue because it was a component step in determining what the final ET charge would be. *Id.* at *24.

⁵⁹² *Id.* at *29.

⁵⁹³ *Id.* at *30.

might encapsulate the whole debate:

Beyond this, however, we also find that the [contract ET] formula used to calculate these numbers is itself unreasonable. What the formula serves to do is to impose upon an early terminating lessee the risk that the contract residual overstates the value of the car, a risk that neither is imposed on lessees who carry their leases to term nor is related to any harm that accrues to NMAC as a result of the early termination.⁵⁹⁴

"Quite so," the consumer plaintiffs would say. "My bargain was to pay a set number of payments and then return the car. If I return the car early, maybe I should have to make the remaining payments, but I certainly should not owe any more than that. What's more, the lessor is getting the car back with less mileage and depreciation than expected."

"Oh, no," the lessor might respond. "Our agreement is not as simple as you make it seem. You agreed to lease the car for a specified term, and we agreed to assume the residual-value risk as of the scheduled expiration date. At any time before that, under the lease contract, you, the lessee, assume that risk. That's why the early termination provision is in the lease in the first place."⁵⁹⁵

The *Miller* case is, at this writing, still on appeal, and until there is a greater body of case law to provide guidance it is hard to draw conclusions on reasonableness.⁵⁹⁶ On the theory the court articulates above, the ET charge formulas in most auto leases would seem vulnerable to a reasonableness challenge. At the same time, the lessor practice of using inflated residuals continues,⁵⁹⁷ and it is often the artificially inflated residual value that creates the distorted early termination charges.

Nor is there any easy alternative to current early termination charge practice that is manifestly more fair to consumers without significantly

⁵⁹⁴ *Id.* (footnotes omitted).

⁵⁹⁵ The lessor might add that the Comment to U.C.C. section 2A-504 identifies just this kind of early termination clause as one that is "common in leasing practice." U.C.C. § 2A-504 cmt. (2002). While it might become unreasonable as applied in a given case, it is not declared to be *per se* unreasonable, unconscionable, or otherwise illegal. *Id.*

⁵⁹⁶ Relevant case law includes interpretations of the liquidated damages provision in U.C.C. Article 2A as well as decisions interpreting the federal C.L.A. See, e.g., *Sun v. Mercedes Benz Credit Corp.*, 562 S.E.2d 714 (Ga. App. 2002) (finding that the lease obligation far exceeded the \$25,000 ceiling for coverage by the federal C.L.A.; thus, UCC Article 2A controlled).

⁵⁹⁷ A 2002 trade association study reports that for the prior year, forty-nine percent of residuals were set above guidebook (and none by more than eleven percent above). This was by contrast to 2000 when sixty-five percent of residuals were set above guidebook (including ten percent that were set more than eleven percent above). CONSUMER BANKERS ASS'N, 2002 AUTOMOBILE FINANCE STUDY, at V.13, fig. V.23 (2002).

restricting lessor pricing options.⁵⁹⁸ There is the "classic default formula" that in effect allows the lessor to recoup all remaining payments under the lease without reduction to present value.⁵⁹⁹ Authors Burke and Cannel suggest an alternative: The early termination charge should consist of the present value of the remaining lease payments plus the present value of the residual-value amount, less the value of the goods at default; the value at default, however, is to be determined not by the actual disposition value of the goods but by "interpolation" of a value along a hypothetical depreciation curve running throughout the lease.⁶⁰⁰ Consumer lawyers currently advocate for a version of this approach, the key to which is that the *realized* value at early termination can never be less than the projected *residual* value at lease expiration.⁶⁰¹ In theory, the U.C.C. default rule for measuring lessor damages on lessee's default should be a useful reference point, as the whole point of the liquidated damages clause is to approximate that amount within a "reasonable" range. The statutory damages formula in U.C.C. Article 2A is not very helpful. U.C.C. section 2A-528(1) would award the lessor the difference between the present value of remaining payments under the lease less the present value of the "market rent . . . for the same lease term" as of the date of repossession.⁶⁰² This may make sense for real estate or certain equipment leases where there is a readily ascertainable market rental rate for used property. In consumer goods markets, particularly for automobiles, there is no such market rent. Used cars coming off lease are not re-leased; they are sold. This lack of a helpful default formula in the U.C.C. only exacerbates the difficulty of deciding whether a substituted liquidated damages in the lease is reasonable or not. "As compared to what?" is the question left dangling.

Against this background, what does the U.C.L.A. add by way of clarification, restriction, or safe harbor? A little of each, it seems.

First, the U.C.L.A. restates the reasonableness test for early termination liability in nearly the same language as is used in the federal C.L.A.⁶⁰³

⁵⁹⁸ In addition to the "common" formula discussed here, the Comment to U.C.C. section 2A-504 describes several others:

Another common liquidated damages formula utilizes a periodic depreciation allocation as a credit to the aforesaid amount in mitigation of a lessor's damages. A third formula provides for a fixed number of periodic payments as a means of liquidating damages. Stipulated loss or stipulated damage schedules are also common.

U.C.C. § 2A-504 cmt.

⁵⁹⁹ See John J.A. Burke & John M. Cannel, *Leases of Personal Property: A Project for Consumer Protection*, 28 HARV. J. ON LEGIS. 115, 121-25 (1991) (criticizing such an approach as inequitable).

⁶⁰⁰ *Id.* at 143-47.

⁶⁰¹ NAT'L CONSUMER L. CTR., TRUTH IN LENDING § 9.5.4.7.2; § 9.5.4.7.2 (4th ed. 1999 & Supp. 2001).

⁶⁰² U.C.C. § 2A-528(1).

⁶⁰³ Compare U.C.L.A. § 405(a) (2002) ("A consumer lease may provide a measure or formula for the lessee's liability on early termination, but only at an amount reasonable in light of the anticipated or actual harm caused by the early termination, the difficulties of proof of loss, and the inconvenience or

It then clarifies that certain amounts payable on early termination are outside the basic payoff figure, that is, the ET charge: (i) sums already due under the lease, such as missed payments, or late or delinquency charges;⁶⁰⁴ (ii) excess wear and tear and excess mileage charges;⁶⁰⁵ (iii) other amounts the lessee owes, such as for traffic tickets or taxes;⁶⁰⁶ (iv) taxes and official fees triggered by the early termination;⁶⁰⁷ and (v) either a fixed disposition fee or the actual costs of retaking and disposing of the goods.⁶⁰⁸ None of these items are relevant to assessing the holder's lost expectancy.

Next, the U.C.L.A. imposes a substantive cap on the amount of any early termination charge, regardless of how reasonable its calculation formula might be.⁶⁰⁹ That cap is the "total of the remaining periodic payments."⁶¹⁰ (In a sense, though not intentionally, this U.C.L.A. cap *requires* what the lessor in the *Miller* case did voluntarily—accept the remaining payments under the lease instead of insisting on payment of an inflated, questionable ET charge.⁶¹¹) As the Comment explains, the U.C.L.A. "does not reject, but does qualify"⁶¹² the view that the lease contract can shift the depreciation risk to the early-terminating consumer. "In effect this [cap] allocates to the holder rather than to the consumer lessee a portion of the risk of bad judgment about depreciation at the time of early termination."⁶¹³

Finally, what of the quest for a safe harbor? Of all the issues in the U.C.L.A. drafting, more than anything else the industry hoped to get statutory language that created a workable safe-harbor formula for early termination charges. Through the drafting process, a number of variants were proposed, but none survived in the statutory text. At the N.C.C.U.S.L. meeting in August 2001, as the industry delegation and the Drafting Committee worked feverishly to find adjustments and compromises that would

unfeasibility of otherwise obtaining an adequate remedy."), with 15 U.S.C. § 1667b(a) (2000) ("Penalties or other charges for delinquency, default, or early termination may be specified in the lease but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the delinquency, default, or early termination, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy.").

⁶⁰⁴ U.C.L.A. § 405(a)(1).

⁶⁰⁵ *Id.* § 405(a)(2). But these cannot be duplicative. For instance, the holder cannot collect excess wear and use charges if the goods have been resold in their unrepaired condition, lowering the realized value.

⁶⁰⁶ *Id.* § 405(a)(3).

⁶⁰⁷ *Id.* § 405(a)(4).

⁶⁰⁸ *Id.* § 405(a)(6).

⁶⁰⁹ *Id.* § 405(b).

⁶¹⁰ *Id.* This cap does not apply to early termination of a true open-end lease, where the holder is presumptively always entitled to at least three monthly payments. *Id.* § 405 cmt. 7; see *id.* § 307 (open-end consumer lease).

⁶¹¹ *Miller v. Nissan Motors Acceptance Corp.*, No. CIV.A.99-4953, 2000 WL 1599244, at *1, *2 (E.D. Pa. Oct. 27, 2000).

⁶¹² U.C.L.A. § 405 cmt. 7.

⁶¹³ *Id.*

mute industry opposition to the Act, the safe harbor issue remained a focus of concern. The upshot is the inclusion in the middle of Comment 6 to U.C.L.A. section 405 of this single sentence:

Thus, an early termination charge that is less than or equal to the unamortized capitalized cost, calculated in accordance with the constant yield method or another generally accepted actuarial method, plus a reasonable prepayment charge disclosed in the lease, minus the realized value of the goods, may be given a rebuttable presumption of reasonableness.⁶¹⁴

Although qualified somewhat by the surrounding Comment language, this is a powerful statement of approbation or tolerance for a mainstream early termination formula. Reference to the “constant yield method”⁶¹⁵ assures that the basic ET charge credits the consumer with unearned interest on the remaining lease payments—similar to an “unpaid principal” balance for a loan. The blessing accorded to the constant yield method conspicuously omits other calculation methods that are less favorable to consumers, such as the Rule of 78s or a straight-line amortization. The sentence also acknowledges justification for a “reasonable prepayment charge” to compensate for incidental losses such as foregone tax benefits, overhead, or lost opportunity costs.⁶¹⁶ And it acknowledges that the appropriate deduction or offset is for the actual “realized value” of the goods, and not some hypothetical or imputed valuation along a depreciation curve.⁶¹⁷ Stated only as a “rebuttable presumption of reasonableness,”⁶¹⁸ this sentence may not be quite the safe harbor the industry sought, but, if the courts find it and give it weight, it is a more protective harbor than they would otherwise have.

⁶¹⁴ *Id.* § 405 cmt. 6.

⁶¹⁵ This is a commonly used version of an actuarial method of calculating how much of each monthly lease payment goes to interest (rent charge) and how much to principal (adjusted lease balance). *E.g.*, CAL. CIVIL CODE § 2985.7(f)(1) (West Supp. 2002):

“Constant yield method” means the following:

(1) In the case of a periodic payment lease, the method of determining the rent charge portion of each base payment in which the rent charge for each computational period is earned in advance by multiplying the constant rate implicit in the lease contract times the balance subject to rent charge as it declines during the scheduled lease term. At any time during the scheduled term of a periodic payment lease, the balance subject to rent charge is the difference between the adjusted capitalized cost and the sum of (A) all depreciation and other amortized amounts accrued during the preceding computational periods and (B) the first base periodic payment.

Id.

The following statutory paragraph recasts this definition for a single payment lease where the amortization flow is reversed. *Id.* § 2985.7(f)(2).

⁶¹⁶ U.C.L.A. § 405 cmt. 6.

⁶¹⁷ *Id.*

⁶¹⁸ *Id.*

One further note on early termination. Where a consumer's early termination of a lease is pursuant to authorization in the lease itself or is otherwise agreed to by the lease holder, and the consumer pays whatever ET charge is due, this termination should not be considered a "default" that would mar the consumer's credit history. U.C.L.A. section 406 makes this explicit.⁶¹⁹

D. *Excess Wear and Use; Excess Mileage*

Lessors understandably want their property returned at the end of a lease in decent working condition, that is, within a predictable range of ordinary wear and use, and without major physical damage, disrepair, and lack of maintenance. To guard against such diminished value and repair costs, most consumer leases set out standards for excess wear and use, and impose charges on the lessee when damage or disrepair of the returned goods exceed those tolerances. Likewise, for automobiles, the lease will typically project estimated mileage and will impose a charge if the car is driven more than that amount.⁶²⁰ Standards for general maintenance, excess wear and use, and excess mileage, are subject to disclosure under the federal C.L.A.⁶²¹

The imposition of these end-of-lease charges has apparently not been a significant source of dispute, gauging from the dearth of case law. But the context and dynamics of closing out a lease present possibilities for abuse, or at least misunderstandings, about these charges, and the U.C.L.A. provides a framework for minimizing those problems. In the most common case, the lessee returns the leased goods at the lease expiration date, either to the lease holder (a finance company or bank), or to the originating dealer acting for the lease holder, or to another dealer as part of the selection of a new car for purchase or lease. Whoever receives the car may give it a cursory inspection on the spot, and it may be examined more closely later, perhaps in preparation for resale. If the dealer or holder then determines that there has been excess wear and use, the lessee will be billed for the charges. By the time the consumer receives that bill, the car will likely have been sold and be effectively untraceable. As a practical matter it is difficult for the consumer to question the legitimacy or amount of those excess wear and use charges. The lessor or holder may be tempted to exaggerate the damage or inflate the charges, especially if it will otherwise

⁶¹⁹ *Id.* § 406.

⁶²⁰ Usually the customer may buy an extra-mileage rider, beyond what the lease would normally expect.

⁶²¹ 12 C.F.R. § 213.4(h) (2002). A motor vehicle lease must flag the potential excess wear charge with a special notice: "Excessive Wear and Use. You may be charged for excessive wear based on our standards for normal use." *Id.* § 213.4(h)(3).

take a big residual value loss. On the other hand, a dealer intent on making a new sale or lease to the consumer will not want to nickel-and-dime that potential customer with excess wear and use charges, especially trumped-up ones. In any case, the holder has precious little leverage to collect excess wear charges if the consumer disputes or refuses to pay them—a small-claims law suit, perhaps.

The U.C.L.A. sets the premise that excess wear and use standards and charges must be “reasonable and reasonably applied,” and may not exceed the cost of repair or refurbishing.⁶²² The standards cannot make the lessee liable for “ordinary and expected wear, use, and depreciation,” nor for damage or repair that is covered by insurance, warranty or service contract if the holder can collect under those coverages and the lessee cooperates in helping the holder collect.⁶²³ Together, these restraints set limits on what can be squeezed into the excess wear and use category, and they assume that “ordinary” wear and tear is part of the lessor’s business risk.

For non-motor vehicle leases, the Act seeks only to require some minimum due process before a consumer can be charged for excess wear. To impose the charge, the holder must notify the lessee of the “nature and amount” of the charges within five days after the goods are returned.⁶²⁴ And the holder must give the lessee “reasonable time and access” for the lessee to examine the goods.⁶²⁵ Notwithstanding some current Comment language, the lessee’s right to inspect the goods ends the matter as far as the U.C.L.A. is concerned.⁶²⁶ If the lessee resists paying the excess wear charges, the holder may pursue any normal collection methods.

Motor vehicle leases present a greater challenge, because the stakes are higher. The amount of excess wear charges can be substantial for the lessee. Simultaneously, there is greater pressure on the holder to dispose of the goods quickly to minimize storage, insurance, and depreciation costs. The approach in the U.C.L.A. is strongly to encourage, but not quite require, an inspection of the vehicle before the scheduled expiration of the lease so that excess wear can be identified, charges set, and (if necessary) disputes resolved before the vehicle is finally turned in on the expiration

⁶²² U.C.L.A. § 407(a).

⁶²³ *Id.* at § 407(b)(1)-(2).

⁶²⁴ *Id.* at § 407(c). The holder must “send” the notice timely; thus the notice is presumably effective when dispatched even if the lessee never receives it.

⁶²⁵ *Id.* § 407. The time must be at least twelve business days, i.e., two and a half weeks, from the sending of the notice. This effectively requires the holder to sequester the goods for at least that long before they can be resold or re-leased.

⁶²⁶ *Id.* § 407, cmt. 4. The original version of this Comment says that the lessee has twelve business days “to arrange a reinspection by a mutually agreeable inspector.” *Id.* There is no support for this reinspection notion in the statutory text. The author confesses blame for not correcting the Comment to fit the final statutory language.

date.⁶²⁷

To start the scenario, a holder of a vehicle lease that wants to be able to impose excess wear and use charges at lease expiration must send the lessee notice within a window of time between thirty and ninety days preceding lease expiration.⁶²⁸ The notice explains the details of the process being initiated:

1. The lessee is invited to bring the car in for an inspection for excess wear, at a "reasonably accessible site," at some point within 20 days of lease expiration;⁶²⁹
2. The lessee may use one of the holder's authorized inspectors (identified in the notice), or an independent inspector agreeable to the holder;⁶³⁰
3. The inspector's report on excess wear and use is binding on the holder if the lessee either pays the charge or has the necessary repairs made at his own expense;⁶³¹
4. Despite this procedure, the holder may still recover for latent damage ("not reasonably detectable by an inspection"), damage incurred in the interval between the inspection and return of the vehicle, or damage that is the result of shoddy repairs. To claim such damages, the holder must notify the lessee within 60 days after return of the vehicle.⁶³²

The lessee is not required to follow this procedure. If the lessee does not get the pre-expiration date inspection, the only specific restraint on the holder is that it must notify the lessee of claimed excess wear and use

⁶²⁷ Connecticut did not adopt the uniform version of U.C.L.A. section 407(e) dealing with excess wear and use procedures for motor vehicle leases. See text *infra* at notes 635-41.

⁶²⁸ U.C.L.A. § 407(e)(1)-(3).

⁶²⁹ *Id.*

⁶³⁰ *Id.*

⁶³¹ *Id.* To say that the inspector's report is "binding" means just what it says. The holder cannot later claim additional (discoverable) damages or that the charges are understated. The U.C.L.A. does not specify what happens if the lessee disputes the inspector's report. Presumably the parties work it out or litigate, if necessary. But at least the lessee has had access to the goods, with a witness (and/or a camera), and has a factual basis for any objections to the inspector's report.

⁶³² *Id.* For these *post hoc* damages to be collectible, the holder need not retain the car nor provide the lessee access to it or a new inspection. In fact the car will likely have been sold, and these later damages may only turn up when the car is inspected closely by a subsequent purchaser. The sixty-day limit may leave the holder exposed to warranty claims by subsequent transferees, without any recourse against the original lessee.

charges within sixty days after return of the car.⁶³³ Of course, the general standard of reasonableness still applies.⁶³⁴

The drafters intent and hope is that this procedure will smoke out most excess wear and tear problems in vehicle leases early enough to allow the parties to deal with them, but without requiring the holder to keep and store the vehicle for an extended period of time. It also struck the Drafting Committee as impractical to interpose some kind of formal dispute resolution process in between return and disposition of the goods.

Connecticut has taken a somewhat different (non-uniform) approach on excess wear and use in vehicle leases. It omits the U.C.L.A. provision on that topic, and instead amends and re-enacts several sections of existing law that set out Connecticut's established excess wear and use procedure.⁶³⁵ Under these provisions, there is no required notice and opportunity for a pre-expiration inspection of the vehicle.⁶³⁶ Instead, the key requirement is an "itemized estimate" of the charges, prepared by a licensed "motor vehicle physical damage appraiser . . . or repair shop."⁶³⁷ The Connecticut process unfolds as follows:

1. Within 45 days after return of the vehicle (or a shorter time agreed by the parties), the holder must send the lessee registered or certified mail notice of the "wear and tear" charges, including the holder's itemized estimate. The notice must alert the lessee that he can contest the charges, and must identify at least three independent appraisers or repair shops from whom the lessee can get a second itemized estimate.⁶³⁸
2. Within fourteen days after the holder's notice is mailed or delivered, the lessee may contest the charge by notifying the holder in writing and getting (within that same fourteen days), at the lessee's own expense, an itemized estimate from a licensed appraiser or repair shop. If the new estimate comes from one of the appraisers or shops identified in the

⁶³³ *Id.* § 407(e)(4).

⁶³⁴ The rules described in this section apply only at scheduled expiration of the lease. If excess wear and use charges are imposed at other times, such as on early termination of the lease, there are no specified notices or other procedures to be followed, but the general reasonableness standard still applies. *Id.* at § 407, cmt. 5d.

⁶³⁵ CONN. GEN. STAT. §§ 42-270, 42-271 (2001).

⁶³⁶ *See id.*

⁶³⁷ *Id.* § 42-271(a). The "appraiser" and "repair shop" must be licensed respectively under CONN. GEN. STAT. §§ 38a-790.

⁶³⁸ *Id.* § 42-271(b).

holder's notice, the lower of the two estimates controls. If the lessee uses a different licensed appraiser or repair shop, the two estimates set a range within which the actual charges must be set.⁶³⁹

3. If the lessee challenges the holder's estimate of excess wear and use charges, the holder must permit the lessee's selected appraiser or repair shop "reasonable access" to the vehicle during the fourteen day challenge period.⁶⁴⁰
4. If the holder fails to send the initial notice, or fails to provide access to the vehicle, the holder may not recover excess wear and tear charges.⁶⁴¹

Since this mechanism predates the U.C.L.A. in Connecticut, and has apparently worked satisfactorily there, it is understandable that the state should want to continue with it. It offers consumers an opportunity to challenge excess wear and tear charges if armed with a second itemized estimate from a licensed appraiser or shop. This all must occur within fairly tight time frames after the vehicle has been returned, i.e., after the lease has expired. The U.C.L.A., by contrast, tries to get the wear-and-tear inspection (and any dispute about it) out of the way *before* return of the goods, thereby allowing the holder to dispose of the goods quickly when they are returned. Perhaps some empirical comparisons over time between the Connecticut approach and the U.C.L.A.'s will show whether one has an advantage over the other.

Back to the U.C.L.A. for one final point concerning lease expiration. Most vehicle leases stipulate a maximum mileage limit over the term of the lease, and impose a per-mile or similar charge for mileage over that limit. Excess mileage is related to excess wear and use, yet is a distinctive aspect of it. The car may be in top repair and unblemished, but if it has an extra 50,000 miles on the odometer, that mileage alone diminishes its resale value. The U.C.L.A. permits "reasonable" excess mileage charges.⁶⁴²

VIII. PUBLIC AND PRIVATE ENFORCEMENT

Consumer protection laws need to be enforceable, either through prosecutions by public officials, or by consumers vindicating their rights in

⁶³⁹ *Id.* § 42-271(c). An unstated inference may be that the parties will split the difference.

⁶⁴⁰ *Id.* § 42-271(d).

⁶⁴¹ *Id.* § 42-271(e).

⁶⁴² U.C.L.A. § 407(f) (2002).

private civil suits, or by a combination of these approaches. The U.C.L.A. includes both.

A. *Public Enforcement and Administration of the Act*

The U.C.L.A. assigns public enforcement to a designated state official, but does not delineate that official's powers or remedies. Rather, it effects a kind of hand-off, where the designated official "has the power and is entitled to the remedies" under an existing consumer fraud act.⁶⁴³ In Connecticut's adoption of the U.C.L.A., the Commissioner of Consumer Protection is authorized to act under the Connecticut Unfair Trade Practices Act ("CUTPA").⁶⁴⁴ The U.C.L.A. drafters advise that the designated agency should "have an array of investigative, injunctive, restitution and similar powers,"⁶⁴⁵ so that public enforcement could be a real deterrent to scoff-laws and an instrument for recovering monetary losses on behalf of consumer victims of unlawful conduct.

The Act also provides that a designated state official or office will have authority to administer the act, and to issue rules, interpretations or approvals that promote the goals of the Act.⁶⁴⁶ The designated "administrator" could, but need not be, the same official as is assigned enforcement authority. Connecticut names the Commissioner of Consumer Protection as administrator as well as enforcer.⁶⁴⁷

Both of these functions—enforcement and administration—are critical for the U.C.L.A. to be able to deliver the protections it promises. An active, responsive enforcement official is the "cop on the beat" of the leasing markets. Thoughtful administration of the Act can permit clarifications and guidance on the application of the act to new or unsettled circumstances, and can perform a regulatory oversight role in gauging the Act's effectiveness.⁶⁴⁸ The administrative function is also important because,

⁶⁴³ *Id.* § 507.

⁶⁴⁴ CONN. U.C.L.A. § 41, 2002 Pub. Acts No. 02-81 (Reg. Sess.). CUTPA is CONN. GEN. STAT. §§ 42-110a to 42-110q.

⁶⁴⁵ U.C.L.A. § 507 cmt. 1.

⁶⁴⁶ *Id.* § 508. Administration of the Act should tend to "effectuate consumer protection" under the Act, "prevent circumvention or evasion" of the Act, "facilitate compliance" with it, "avoid preemption" by the federal C.L.A., and "assure consistent interpretations" with those of other states enacting the U.C.L.A. *Id.* § 508(a). To help harmonize interpretations among enacting states, the Administrator is instructed to "take into consideration" the interpretations made by administrators in other states. *Id.* § 508(b). The U.C.L.A. makes clear that while "uniformity of interpretation is a general objective," there is no "cession of any authority with respect to this Act to officials of other states." *Id.* § 508, cmt. 3.

⁶⁴⁷ CONN. U.C.L.A. § 42, 2002 Pub. Acts No. 02-81 (Reg. Sess.).

⁶⁴⁸ For comparison, at the federal level, the Federal Reserve Board's Division of Consumer and Community Affairs performs a significant administrative role for a variety of federal laws, including the federal C.L.A. The Division drafts regulations and issues "Staff Commentary" interpreting those

under the Act, lessors may be protected from liability where they act in accordance with official regulations or interpretations, even if the regulation or interpretation is later overturned in the courts.⁶⁴⁹

Sustaining the enforcement and administrative functions will require some commitment of state resources, unless the state can absorb the incremental costs within existing expense lines—that means new budget requests and authorizations. The U.C.L.A. does not even attempt to project what kinds of personnel or other resources might be needed, but they should not be huge and may be offset in part by fines or civil penalties recovered by the agency.⁶⁵⁰

B. *Private Civil Actions by Consumers*

Empowering consumers to vindicate their own rights, and to serve as private attorneys general in policing consumer markets, has been an important component of most modern consumer protection laws, and the U.C.L.A. is no exception. Violations of the U.C.L.A. may be the basis for affirmative actions by consumers for actual and, in some cases, statutory damages.⁶⁵¹ Violations may also be asserted defensively against collection actions, as claims in recoupment.⁶⁵² A successful consumer litigant is generally entitled to court costs and attorney's fees.⁶⁵³

Exposure to civil liability is perhaps the most sensitive aspect of the U.C.L.A. for the leasing industry and for consumer representatives. For the latter, it is critical that consumers be authorized to sue for violations of consumer laws and that they have incentives to do so in the form of statutory damages and litigation expenses. The industry objects in principle to liability without proof of harm, which is what statutory damages provide. But the industry's greatest concern is class actions, especially for statutory damages based on allegations of "technical" violations across a whole portfolio of lease transactions.⁶⁵⁴ The U.C.L.A. drafting battles over the extent

regulations for all creditors and lessors subject to them. It also oversees enforcement of those laws and regulations for state banks that are members of the federal reserve system.

⁶⁴⁹ U.C.L.A. § 504(d); see text *infra* at notes 566-75.

⁶⁵⁰ In an OFA Fiscal Note accompanying Connecticut's enactment of the U.C.L.A., it is acknowledged that another complaint-examiner position could be needed for enforcement (\$82,000), but that administrative regulations would be adopted "within existing resources." Potential revenue gain from civil penalties was also acknowledged, but not quantified. HB5248, File No. 593 (2002).

⁶⁵¹ See discussion *infra* Part IX (discussing actions and damages available under the U.C.L.A.).

⁶⁵² *Id.*

⁶⁵³ *Id.*

⁶⁵⁴ One industry-oriented observer characterized the penultimate draft of the U.C.L.A. as the "Unlimited 'Class action' Liability Act." Thomas B. Hudson, *Commentary*, SPOT DELIVERY, Vol. 3, Issue 11, at 1 (Consumer Credit Compliance Co., June 2001). Concern over class action suits, and the enormous settlement leverage they provide consumers and their lawyers, is a major factor in the increasing use of mandatory arbitration clauses in consumer financial agreements. See *supra* notes 635-36.

of civil liability for violations continued into the frenetic three days of negotiations at the N.C.C.U.S.L. meeting in August 2001 and, as a result, the Act contains a somewhat curious mix of liability rules and limitations on their applicability.

1. *Actual Damages; Declaratory and Injunctive Relief*

Any violation of the U.C.L.A. subjects the guilty holder to liability for "actual damages,"⁶⁵⁵ which includes "both direct and consequential damages."⁶⁵⁶ While liability attaches in the first instance to the "holder that violates this Act," a subsequent assignee is generally also exposed to liability for violations by the prior holder.⁶⁵⁷ This permits consumers to assert violations by the original lessor defensively in collection actions by a current holder that acquired the lease from that original lessor. For disclosure violations, the Act specifies that the lessee must show "reliance on the holder's conduct to the lessee's detriment" to recover actual damages.⁶⁵⁸ Thus a consumer would usually have to show that he was conscious of the mis-disclosed information, proceeded with the lease transaction nonetheless, but could have gotten more favorable terms elsewhere. The U.C.L.A. does not enumerate which "disclosure" violations are subject to this "reliance" limitation, but presumably it includes all the disclosure or information requirements discussed in Part V of this Article.

Since the Act does not prohibit class actions for actual damages, class action suits are permissible where they are allowed under the procedural rules of the state. That is, the U.C.L.A. does not create a basis for class certification where one does not otherwise exist. With the requirement for individualized reliance on disclosure violations and the variable nature of actual damages in other cases, class actions for actual damages under the U.C.L.A. will probably be rare.

In an appropriate case, a consumer may also seek a declaratory judgment or injunction.⁶⁵⁹ The statutory text makes clear that this can be a free-standing claim and need not be ancillary to a claim for monetary damages.

2. *Statutory Damages for Certain Violations*

Statutory damages are recoverable for violations of specified sections

⁶⁵⁵ U.C.L.A. § 501(b) (2002).

⁶⁵⁶ *Id.* cmt. 3. For example, a forcible middle-of-the-night repossession might give rise to damages for emotional distress as well as the conversion value of the retaken goods.

⁶⁵⁷ U.C.L.A. § 505.

⁶⁵⁸ *Id.* By stating this reliance test explicitly, the U.C.L.A. conforms to a consistent line of cases construing the actual damages provision of the federal T.I.L.A. that applies to leases through the federal C.L.A. See *Turner v. Beneficial Corp.*, 242 F.3d 1023, 1026 (11th Cir. 2001) (en banc) (stating that detrimental reliance is an element of a T.I.L.A. claim for actual damages), and cases cited therein.

⁶⁵⁹ U.C.L.A. § 501(c).

of the Act, most of which are disclosure rules in one form or another.⁶⁶⁰ The rationale is that these violations rarely produce provable actual damages, yet we want to give consumers an incentive to challenge bad practices and a modest reward if they are successful.

As for the amount of statutory damages, the U.C.L.A. parallels the federal C.L.A.⁶⁶¹ The consumer who proves a violation of one of the listed sections recovers twenty-five percent of the amount of payments scheduled under the lease,⁶⁶² with a minimum of \$500 and a maximum of \$1,000.⁶⁶³ While these statutory damages operate as a substitute for difficult-to-prove actual damages in most cases, a consumer may recover *both* actual and statutory damages.⁶⁶⁴

The most significant limitation on statutory damages under the U.C.L.A. is that they cannot be pursued in a class action.⁶⁶⁵ The Drafting Committee was persuaded that class action combinations of statutory damages across large classes of consumers, sometimes based on mechanical violations and without proof of any actual harm, are enforcement overkill.⁶⁶⁶ Individual actions still lie for statutory damages, but lessors and

⁶⁶⁰ *Id.* § 501(d). The specified provisions are:

- § 203(a),(b),(c)(1),(2),(4),(5),(d) (all disclosures due at consummation of a lease, except the location of the lessor and lessee, (c)(3), and copies of transaction documents,(c));
- § 204 (insurance disclosures);
- § 206 (information during term of lease);
- § 301 (handling payments or trade-in pending lessor's approval of the lease);
- § 303(d) (accounting for application of security deposit);
- § 304(b) (pyramiding late charges);
- § 308(c) (application of refunded insurance premiums);
- § 309 (referral inducements);
- § 406 (reporting voluntary termination as a default); and
- § 407(c) (notice of excess wear and use charges in non-motor vehicle lease)

There may not be a completely coherent rationale for subjecting these violations to statutory damages and not others. That is often the nature of provisions like this one, which are political compromises.

⁶⁶¹ There is, in fact, a significant overlap between the federal C.L.A. and the U.C.L.A. regarding statutory damages. For leases covered by both acts (i.e., up to \$25,000), statutory damages for transactional disclosure violations are recoverable under each act. But the U.C.L.A. § 506(b), permits only a single recovery in such cases. Since the caps on statutory damages are the same under both acts (\$1,000), the point is largely moot.

⁶⁶² In the federal C.L.A., this twenty-five percent figure was used on the theory that that amount would roughly approximate twice the amount of the finance charge in a credit transaction, which is the baseline measure of statutory damages for violation of T.I.L.A. disclosure rules. Ralph J. Rohner, *Consumer Credit Legislation in the Ninety-Fourth Congress – and a Look Ahead*, 9 U.C.C.L.J. 307, 337 (1977). Cf. T.I.L.A. § 130(a)(2)(A)(i), 15 U.S.C. § 1640(a)(2)(A)(i) (2000).

⁶⁶³ 9 U.C.C.L.J. 307, 337 (1977). The federal C.L.A. cap is also \$1,000, but the minimum is only \$100.

⁶⁶⁴ U.C.L.A. § 501(d). The federal C.L.A. is to the same effect.

⁶⁶⁵ *Id.* § 501(d) (“[e]xcept in a class action . . .”).

⁶⁶⁶ This creates some divergence between the U.C.L.A. and the federal C.L.A. in cases where they both apply. Nothing in the federal act prohibits class actions for statutory damages; indeed T.I.L.A. recognizes their legitimacy by setting a cap on class action recovery and factors for a court to apply in setting a maximum class action recovery. T.I.L.A. § 130(a)(2)(B), 15 U.S.C. § 1640(a)(2)(B).

holders will not be subject to the potentially vast liabilities, and resulting settlement leverage, that class actions generate. It is better, the Committee believed, that widespread violations without measurable harm be monitored and policed by the state Attorney General or other consumer protection officials.

3. *Court Costs and Attorney's Fees*

Like most consumer laws, the U.C.L.A. entitles the successful consumer litigant to recover court costs and "reasonable" attorney's fees.⁶⁶⁷ The amount of damages recovered is not controlling on the amount of attorney's fees, which, to be reasonable, should reflect the time, energy, and skill brought to the case.⁶⁶⁸ When and how a consumer is "successful" in a multi-claim or multi-count lawsuit is not specified in the Act, although the drafters indicate by Comment that a consumer is "successful . . . whenever a favorable court judgment or settlement is based on a violation of this Act."⁶⁶⁹ This suggests that even when litigation is settled, the consumer may petition the court for attorney's fees (if they are not provided for in the settlement agreement). Case law under other consumer protection laws can be a source of guidance on these issues.⁶⁷⁰

As a result of the last-minute negotiations at the N.C.C.U.S.L. meeting in August 2001, the Act contains a provision that limits the consumer's right to attorney's fees where the consumer refuses a settlement offer and recovers at trial no more than the amount of that settlement offer.⁶⁷¹ While this is justified in the Comments as "encouraging settlements in actions for monetary damages,"⁶⁷² it is also an obvious effort to chill or foreshorten litigation whenever the lease holder offers to settle for a respectable amount.⁶⁷³ It also tends to place a wedge between the consumer lessee and her lawyer, because after a settlement offer, the lawyer who pursues litigation, at the client's insistence or the lawyer's, risks going uncompensated unless the court award is larger than the settlement offer.

The control on the lessee's right to attorney's fees operates only where

Many such T.I.L.A. class suits have been certified. *Cf.* RALPH J. ROHNER & FRED H. MILLER, TRUTH IN LENDING ¶ 12.08 (2000); NAT'L CONSUMER L. CTR., TRUTH IN LENDING § 8.8 (4th ed. 2001). To this extent the industry's victory on class actions under the U.C.L.A. may be Pyrrhic.

⁶⁶⁷ U.C.L.A. § 501(e).

⁶⁶⁸ *Id.* cmt. 6.

⁶⁶⁹ *Id.*

⁶⁷⁰ See generally RALPH J. ROHNER & FRED H. MILLER, TRUTH IN LENDING ¶ 12.04[3] (2000); NAT'L CONSUMER L. CTR., TRUTH IN LENDING § 8.9 (4th ed. 2001).

⁶⁷¹ U.C.L.A. § 501(f).

⁶⁷² *Id.*

⁶⁷³ For instance, if there are no actual damages and the holder offers to pay \$1,000 (the maximum statutory damages liability for a U.C.L.A. violation), neither the lessee nor her counsel have much incentive to initiate or prolong litigation. The lessee will never get more than the proffered \$1,000, and the lawyer will not get paid for efforts beyond receipt of that settlement offer.

the consumer lessee is the plaintiff in an action for money damages⁶⁷⁴ and does not apply when the lessee seeks injunctive or declaratory relief, or where the lessee is asserting a U.C.L.A. violation defensively or as a counterclaim in a collection action.⁶⁷⁵ It contemplates the following scenario:

- Before filing suit the plaintiff must send the holder a demand letter stating the alleged violation and the damages sought.⁶⁷⁶
- The holder then has twenty days to give the lessee a settlement offer.⁶⁷⁷
- If the lessee accepts the settlement offer, that should end the matter. Whether included specifically in the settlement offer or not, the lessee is entitled to attorneys' fees for work done before receipt of the settlement offer.
- If the lessee rejects the settlement offer, the litigation may proceed, but unless the court awards damages to the lessee in an amount *greater* than the settlement offer amount, the lessee recovers no attorney's fees incurred after the settlement offer.⁶⁷⁸

This procedure puts pressure on the lessee and lessee's counsel to calculate their litigation strategy carefully lest they accrue unpayable attorney's fees. It also forces lease holders to decide whether to pay off pesky consumer litigants at the threshold of litigation, or to contest their allegations of U.C.L.A. violations on the merits while the meter runs on the plaintiff's attorney's fees.

4. *Statutes of Limitations*

The time limits for exposure to civil liability can sometimes be as important as the liability itself. The U.C.L.A. statute of limitations provisions again reflect some political compromises.

⁶⁷⁴ U.C.L.A. § 501(f) (referring specifically to "a lessee as plaintiff in an action for monetary damages").

⁶⁷⁵ *Id.* cmt. 7.

⁶⁷⁶ *Id.* § 501(f)(1).

⁶⁷⁷ *Id.* § 501(f)(2). The lessee may file suit in the interim, while waiting for the holder's response to the demand letter. In addition, the lessee's demand letter tolls the statute of limitations for sixty days, so that the lessee and her counsel may evaluate the settlement offer without tripping over the limitations deadline.

⁶⁷⁸ *Id.*

The basic limitations period for an action asserting a violation of the Act is one year after the "termination of the lease."⁶⁷⁹ This is ostensibly the same as the limitations period under the federal C.L.A.⁶⁸⁰ "Termination" is not defined under the federal act, but it is under the U.C.L.A.⁶⁸¹ Termination occurs when the lessee no longer has the right to possession and use of the goods through either (i) expiration of the lease; (ii) an election to terminate by one of the parties as provided in the lease, such as by default or other early termination; or (iii) agreement of the parties at any time.⁶⁸² The trigger for starting the statute of limitations running should not be difficult to determine in most cases. Where the lessee is in default, it may not be obvious when the holder elects to terminate and case law under the federal C.L.A. may be helpful.⁶⁸³

To this general statute of limitations there are several qualifications:

- A class action (which is permitted only for *actual* damages or non-monetary relief) is time-barred after a year from the occurrence of the alleged violation.⁶⁸⁴
- For violations with respect to disclosures due at or prior to closing of the lease deal, the statute of limitations runs two years from the "execution of the lease."⁶⁸⁵

A note on the Connecticut version of the U.C.L.A. is in order here. Connecticut has set each of the respective limitations periods just discussed at *three* years from the triggering event.⁶⁸⁶ Thus the general statute of limitations is three years from termination of the lease; class actions may be brought within three years after occurrence of the violation, and pre-closing disclosure violations are actionable for three years from the consummation of the lease. These adjustments, one can assume, represent

⁶⁷⁹ *Id.* § 503(a).

⁶⁸⁰ 15 U.S.C. § 1667d(c) (2000).

⁶⁸¹ U.C.L.A. § 103(c).

⁶⁸² *Id.*

⁶⁸³ See *Carmichael v. Nissan Motor Acceptance Corp.*, 291 F.3d 1278, 1281 (11th Cir. 2002) (stating that a lease terminates when leased vehicle leaves the lessee's possession through voluntary surrender or repossession).

⁶⁸⁴ U.C.L.A. § 503(b). This effectively shrinks not only the window of opportunity for filing a class action, but also reduces the potential size of the class to those who suffered provable actual damages within the twelve month period between the violation and the filing of the action.

⁶⁸⁵ *Id.* § 503(c). One effect of this rule is to create different statutes of limitations for the transactional disclosures that are subject both to the federal C.L.A. and to the U.C.L.A.; most notably the disclosures required under U.C.L.A. section 203(a). If a lease (of no more than \$25,000) has disclosure violations, the statute of limitations under the federal C.L.A. is a year after the lease terminates, while under the U.C.L.A. it is two years from lease signing. For any lease longer than one year, the U.C.L.A. statute of limitations is shorter than the C.L.A.'s.

⁶⁸⁶ CONN. U.C.L.A. § 37(a)-(b), 2002 Pub. Acts No. 02-81 (Reg. Sess.).

consumer victories or industry concessions in the Connecticut legislature.

Then, under the U.C.L.A., there is the recognition that, despite any other applicable limitations period, a lessee may always raise a violation of the Act "by way of recoupment" in a holder's collection action on the lease. This too parallels the federal T.I.L.A. rule.⁶⁸⁷ To the extent U.C.L.A. violations are asserted defensively in this manner, the effective limitations period runs as long as the statute of limitations on the holder's collection claim. Under U.C.C. Article 2A, a lessor or holder may commence an action for default under the lease "within four years after the cause of action accrued."⁶⁸⁸ Assume a case where a lessee defaults on obligations due under a sixty-month lease at or close to expiration of the lease. The lease holder has four full years thereafter to sue the lessee for those obligations. Then the lessee may introduce as a "claim in recoupment" a U.C.L.A. violation committed any time during the lease period, including a disclosure violation at or before lease signing. For a lessee in this posture, the effective statute of limitations approaches or even exceeds nine years from the time of the violation.

While the example just used is an exaggerated case, it highlights the battles over limitations periods. Violations of the U.C.L.A. will often not be self-evident and consumer lessees ought not be deprived of appropriate remedies in circumstances where they cannot know of, or act on, violations immediately.⁶⁸⁹ On the other hand, lessors and lease holders—including downstream assignees and securitizers—should not have to carry contingent liabilities and indemnification responsibilities for lengthy or indeterminate periods of time. The U.C.L.A. cuts down the limitations periods for actions initiated by a consumer, but preserves the consumer's right to interpose U.C.L.A. violations defensively for however long the holder has to sue the lessee for breach of the lease itself. Time will tell whether this is an appropriate balance.

5. *Protective Rules for Lessors/Holders*

In part to parallel certain protective rules for lessors under the federal C.L.A., the U.C.L.A. also immunizes a lessor or holder from liability for violating the U.C.L.A. under some circumstances. These provisions were

⁶⁸⁷ 15 U.S.C. § 1640(e) (2000). Connecticut enacted the U.C.L.A. language for this subsection. CONN. U.C.L.A. § 37(d), 2002 Pub. Acts No. 02-81 (Reg. Sess.).

⁶⁸⁸ U.C.C. § 2A-506(1) (2002).

⁶⁸⁹ U.C.L.A. § 503 cmt. 3 (alluding to the doctrine of "equitable tolling," which may suspend the statute of limitations if a party consciously conceals a violation or other misconduct. The drafters say, however, that the Act "takes no position on when or whether" the doctrine is appropriate). The doctrine has been applied in T.I.L.A. litigation, although several recent T.I.L.A. cases have refused to apply "equitable tolling" when the consumers themselves failed to exercise due diligence to discover the violations. *Taylor v. The Money Store*, No. 00-35930, 2002 WL 1769962, at *1 (9th Cir. Aug. 1, 2002); *Ignash v. First Serv. Fed. Credit Union*, No. 01AP-1326, 2002 WL 1938412, at *2, *3 (Ohio App. 10th Dist. Aug. 22, 2002).

never controversial in the U.C.L.A. drafting process and can be summarized here.

a. Reliance on Lessee's Representation

A holder has no liability for violating the U.C.L.A. if the holder reasonably believed, based on reasonable reliance on the lessee's representation, that the leased goods were not intended for consumer purposes.⁶⁹⁰ This immunity, based on a comparable provision in U.C.C. section 9-628(c), shields the holder against both private civil actions and governmental enforcement. The premise is that if a lessee has indicated in a record, expressly and persuasively, that the leased goods are for business, agricultural or other non-consumer use, the lessor may rely on that representation and treat the lease as outside U.C.L.A. coverage.

b. Cure of Violation

A holder avoids liability for statutory damages (but not actual damages) if it discovers a violation on its own and (within sixty days) fixes it before the lessee either files suit or gives the holder written notice of the violation.⁶⁹¹ To cure the error, the holder must refund or make other adjustments for any charges that were mis-disclosed or wrongly imposed.

c. Good Faith Error

A holder is not liable for statutory damages if it can prove that the violation was a good faith error or oversight that occurred despite procedures reasonably designed to avoid such errors.⁶⁹² Examples could include clerical or calculation errors or computer malfunction, but *not* errors in legal judgment about what the U.C.L.A. requires.

d. Multiple Lessees

Where there is a U.C.L.A. violation in a lease that has co-lessees, only one measure of statutory damages may be imposed.⁶⁹³

e. Reliance on Official Interpretations

A holder has no liability for actual or statutory damages or otherwise under the U.C.L.A., provided that the holder acted in good faith in conformance with official regulations or interpretations of the Act by the administrator (Attorney General, or other consumer protection official), even if the interpretation is later reversed, rescinded or modified.⁶⁹⁴ The same

⁶⁹⁰ U.C.L.A. § 502 (2002).

⁶⁹¹ *Id.* § 504(a), based on T.I.L.A. § 130(b), 15 U.S.C. § 1640(b).

⁶⁹² *Id.* § 504(b), based on T.I.L.A. § 130(c), 15 U.S.C. § 1640(c).

⁶⁹³ *Id.* § 504(c), based on T.I.L.A. § 130(d), 15 U.S.C. § 1640(d).

⁶⁹⁴ *Id.* § 504(d)(1), based on T.I.L.A. § 130(f), 15 U.S.C. § 1640(f).

protection is afforded with respect to interpretations of the federal C.L.A. by the Federal Reserve Board or its staff with respect to the Regulation M rules incorporated in the U.C.L.A. by reference.⁶⁹⁵

f. Multiple Violations

Where a lease contains multiple violations of the disclosure rules that support recovery of statutory damages, only a single recovery of statutory damages is allowed.⁶⁹⁶ A separate provision in the U.C.L.A. deals with the situation where a violation of the U.C.L.A. also violates some other law, which could be the federal C.L.A., or a state U.D.A.P. statute.⁶⁹⁷ If there are different measures of liability under the two laws, the consumer lessee is entitled to the larger of the two recoveries, but not both.

Most of these protective provisions have track records, principally under T.I.L.A. (which, for enforcement purposes, includes the C.L.A.). Judicial interpretations and applications of those rules in T.I.L.A. should for the most part be transferable to the U.C.L.A.⁶⁹⁸

IX. CONCLUSION

So there you have it. The National Conference of Commissioners on Uniform State Laws, responding to felt concerns about the limited consumer protection rules in U.C.C. Article 2A, has promulgated the Uniform Consumer Leases Act to fill that gap and hopefully to bring greater consistency and balance to the laws regulating leases of consumer goods. The new Act borrows a number of baseline standards and protections from established consumer credit laws to address issues that are common to transactions in either credit sale or lease form. It also posits rules or frameworks for evaluating terms and practices that are unique to leases. This is supported by an enforcement structure that is rigorous but hopefully fair.

Is the U.C.L.A. a perfect regulatory response to leasing issues, a panacea for all the ills of the consumer lease markets for our lifetimes? Almost certainly not. The ingenuity of the marketplace always outruns the regulatory response, and practices will evolve that the U.C.L.A. fails to address at all, or deals with inadequately. There may be questionable judgments or

⁶⁹⁵ *Id.* § 504(d)(2).

⁶⁹⁶ *Id.* § 504(e), based on T.I.L.A. § 130(g), 15 U.S.C. § 1640(g). This is justified in part because often, if one number is miscalculated or misstated, a whole series of numbers derived from that one will also be inaccurate.

⁶⁹⁷ *Id.* § 506(b).

⁶⁹⁸ See RALPH J. ROHNER & FRED H. MILLER, TRUTH IN LENDING ¶ 12.05 (2000); NAT'L CONSUMER L. CTR., TRUTH IN LENDING ¶ 7.3, ¶ 9.7.6 (4th ed. 2001). But note that the rules under T.I.L.A. are not always precisely the same as those under the U.C.L.A. The "good faith error" defense under T.I.L.A., for example, protects a holder against both actual and statutory damages. The companion rule in the U.C.L.A., however, protects only against statutory damages.

drafting omissions or blunders in the U.C.L.A. as promulgated.⁶⁹⁹ But there are also numerous provisions that are carefully considered and carefully crafted to bring greater order and integrity to the markets for consumer leasing, a greater degree of bright-line guidance on permissible practices, and ample disclosure so that consumers can more often protect themselves and lessors can compete on a more level field.

It is frustrating, to some degree, that the U.C.L.A. could not resolve definitively some of the important issues affecting consumer leases, such as:

- The precise bounds of “reasonableness” for early termination charges;
- The appropriateness of electronic self-help;
- The proper treatment of “smart goods”;
- Truly equivalent treatment of lessees under the Magnuson-Moss Warranty Act; and
- The formulation of a workable “lease rate” disclosure.

In the Drafting Committee’s defense, some of these matters have gone unsolved by able courts and other drafting bodies. Some are probably just not politically ripe for resolution, and others may simply be intractable. The effort to position the U.C.L.A. to complement, and be complemented by, other law such as the federal C.L.A. and U.C.C. Article 2A, has brought to light some uncertain regulatory boundaries between credit sales and leases, some of which can only be clarified by law outside the U.C.L.A. For example, only Congress (or perhaps the Federal Trade Commission or the Federal Reserve Board) can confirm whether consumer leases are covered by the Magnuson-Moss Warranty Act or the Equal Credit Opportunity Act. If nothing else, perhaps promulgation of the U.C.L.A. will prompt legislators and regulators generally to be more conscious of leases as a marketplace option, and to state clearly their intentions as to coverage of leases in any other consumer protection laws they draft.

No one, certainly not this author, can predict an enactment pattern for the U.C.L.A. It is enacted in Connecticut partly to resolve a political stand-off there over U.C.C. Article 2A. States that have no consumer leasing laws on their books could readily adopt the U.C.L.A. as a companion to their existing laws on credit sales. In states that have consumer leasing

⁶⁹⁹ Under N.C.C.U.S.L. practice, the original Drafting Committee becomes the Stand-By Committee to monitor the Act through its adoption and implementation in the states. In that role, the Committee has already caught and fixed several glitches in the U.C.L.A.’s Official Comments.

laws in place, there can be a problem of inertia—it may be more difficult to gain consensus to change existing law than to enact to fill a void. While N.C.C.U.S.L. always hopes (and works) for widespread, even truly “uniform,” adoption of their acts, that may simply not be realistic. Still, the Act might be adopted in modified form, for example, applicable only to motor vehicle leases. Or pieces of the U.C.L.A. might be added to existing laws, for example in U.C.C.C. states that already address a number of consumer lease issues. To whatever extent the U.C.L.A. is adopted, it should help consumers and the marketplace generally.